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In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35010

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF-APPELLANT

AND

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON; CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; BARBARA J. HERMAN, ADMINISTRATOR OF THE STATE OF WASHINGTON OFFICE OF MARINE SAFETY; DAVID MACEACHERN, PROSECUTOR OF WHATCOM COUNTY; K. CARL LONG, PROSECUTOR OF SKAGIT COUNTY; JAMES H. KRIDER, PROSECUTOR OF SNOHOMISH COUNTY; NORMAN MALENG, PROSECUTOR OF KING COUNTY, DEFENDANTS-APPELLEES

AND

NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL; OCEAN ADVOCATES, INTERVENORS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Argued and Submitted Feb. 4, 1998
Decided June 18, 1998]

JOHN C. COUGHENOUR, District Judge, Presiding.
D.C. No. CV-95-1096 JCC.

Before: BROWNING and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge.

O'SCANNLAIN, Circuit Judge:

We must decide whether Washington's Best Achievable Protection Regulations, which impose requirements on oil tankers to prevent oil spills, are preempted by comparable federal legislation under the Supremacy Clause or otherwise violate the United States Constitution.

I

In the aftermath of the Exxon Valdez oil spill in 1989, the State of Washington enacted laws to protect its waters from pollution by oil tankers. *See* Wash. Rev. Code §§ 88.46.010, *et seq.*; Wash. Admin. Code §§ 317-21-010, *et seq*. These provisions require that, in order to transport oil in state waters, tanker operators must: (1) file oil-spill prevention plans with the state, and (2) comply with the state's Best Achievable Protection ("BAP") Regulations, which are promulgated by the Washington Office of Marine Safety. *See* Wash. Rev. Code § 88.46.040. The International Association of Independent Tanker Owners ("Intertanko") maintains that sixteen of these regulations are unconstitutional.

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* The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

The district court summarized the challenged regulations as follows:

> 1. Event Reporting—WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.
>
> 2. Operating Procedures—Watch Practices—[WAC 317-21-200].[1] Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.
>
> 3. Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.
>
> 4. Operating Procedures—Engineering—WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.

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[1] The district court misidentified this regulation as "WAC 317-21-130." *International Association of Independent Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1488 (W.D. Wa. 1996).

5. Operating Procedures—Prearrival Tests and Inspections—WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

6. Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

7. Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

8. Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

9. Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317-21- 235. Requires drug and alcohol testing and reporting.

10. Personnel Policies—Personnel Evaluation—WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew

members on vessels covered by a prevention plan who serve for more than six months in a year.

11. Personnel Policies—Work Hours—WAC 317-21-245. Sets limitations on the number of hours crew members may work.

12. Personnel Policies—Language—WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

13. Personnel Policies—Record Keeping—WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

14. Management—WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.

15. Technology—WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports—WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice

report any conditions that pose a hazard to the vessel or the marine environment.

International Association of Independent Tanker Owners (Intertanko) v. Lowry, 947 F. Supp. 1484, 1488-89 (W.D. Wa. 1996). Failure to comply with the BAP Regulations subjects tanker owners to the following: (1) assessment of civil penalties, *see* Wash. Rev. Code § 88.46.090; (2) criminal prosecution, *see* Wash. Rev. Code § 88.46.080; and (3) denial of entry into state waters, *see* Wash. Admin. Code § 317-21-020.

Seeking both a declaration that the above-mentioned BAP Regulations are unconstitutional and a permanent injunction against their enforcement, Intertanko filed suit in federal district court.[2] Intertanko alleged that the requirements imposed by the regulations on tanker manning, training, management, safety, and on-board equipment were preempted by various federal statutes, including the Oil Pollution Act of 1990, the Port and Tanker Safety Act of 1978, the Ports and Waterways Safety Act of 1972, and the Tank Vessel Act of 1936. Intertanko also maintained that several of the BAP Regulations were preempted by Coast Guard regulations and by various international treaties. In addition to asserting that the BAP Regulations are invalid under the Supremacy Clause, Intertanko argued that the regulations violate the Commerce Clause and impermissibly infringe upon the foreign affairs power of the federal government.

The district court granted the State's motion for summary judgment and upheld every one of the

[2] Intertanko named as defendants the Governor of Washington and various other state and local officials responsible for the promulgation and enforcement of the regulations.

challenged regulations. *See Intertanko*, 947 F. Supp. at 1500-01. Intertanko filed a timely appeal. Three environmental organizations—the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates—have intervened on behalf of the state defendants, while the United States has intervened on behalf of Intertanko.

II

Intertanko's primary contention on appeal is that the BAP Regulations are preempted by federal law. Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consideration of preemption issues "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L.Ed.2d 179 (1963)).

The state defendants maintain that Congress expressly indicated its intent not to preempt state law in the field of oil-spill prevention when it passed § 1018 of the Oil Pollution Act of 1990 ("OPA 90"). *See* Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. § 2701, *et seq.*). That provision states, in pertinent part:

(a) Preservation of State authorities . . . *Nothing in this Act*[3] or the Act of March 3, 1851 shall—

> (1) *affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to*—
>
> > (A) *the discharge of oil or other pollution by oil within such State* . . . .

. . . .

(c) *Additional requirements* and liabilities; penalties *Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 *et seq.*) or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—

> (1) *to impose* additional liability or *additional requirements*; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

33 U.S.C. § 2718(a) (emphasis added).

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[3] When OPA 90 was codified, all references to "Act" became "chapter."

The state defendants maintain that, by providing that nothing in OPA 90 preempts states from imposing "additional liability or requirements with respect to the discharge of oil or other pollution by oil," 33 U.S.C. § 2718(a); *see also* 33 U.S.C. § 2718(c), § 1018 grants states broad authority to enact oil-spill prevention regulations. In response, Intertanko argues that the savings clause of § 1018, which is located in Title I of OPA 90, applies only to that Title. Therefore, Intertanko asserts, § 1018 is limited in its application to state laws concerning liability and penalties, the subjects covered by Title I. Intertanko claims that the savings clause does *not* apply to the other eight Titles of OPA 90, including Title IV, which concerns oil-spill prevention.[4] Therefore, Intertanko contends, the savings clause contained in Title I does not preclude the oil-spill prevention provisions included in Title IV from preempting the oil-spill prevention provisions included in the BAP Regulations. In support of this argument, Intertanko notes that § 1018's savings clause is located not in a preamble to OPA 90, but instead near the end of Title I. Intertanko further observes that the language of § 1018 is consistent with the subject matter of Title I, which concerns oil-spill liability and penalties,

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[4] OPA 90 contains nine Titles. These include: Title I, Oil Pollution Liability and Compensation; Title II, Conforming Amendments; Title III, International Oil Pollution Prevention and Removal; Title IV, Prevention and Removal; Title V, Prince William Sound Provisions; Title VI, Miscellaneous Provisions; Title VII, Oil Pollution Research and Development Program; Title VIII, Trans-Alaska Pipeline System; and Title IX, Oil Spill Fund Transfers. *See* 33 U.S.C. § 2701, *et seq.*

but inconsistent with the subject matter of Title IV, which concerns oil-spill prevention.[5]

Intertanko's argument that § 1018's savings clause applies only to Title I is at odds with that clause's plain language. Section 1018(a) provides that "[n]othing *in this Act*" preempts states from "imposing any . . . requirements with respect to the discharge of oil or other pollution by oil." 33 U.S.C. 2718(a) (emphasis added). By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well. Accordingly, because the oil-spill prevention requirements set forth in the BAP Regulations clearly "respect"[6] the discharge of oil, they are not preempted by anything in OPA 90.

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[5] Intertanko also points out that Title I of OPA 90 is labeled "Liability and Compensation." However, § 6001(c) of OPA 90 states that "[a]n inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act." 33 U.S.C. § 2751(c).

[6] Like the phrase "relating to" employed in § 1018(c), the phrase "with respect to" used in § 1018(a) is "clearly expansive." *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, — U.S. ——, ——, 117 S. Ct. 1747, 1751, 138 L.Ed.2d 21 (1997) (discussing "relate to" language of Employee Retirement Income Security Act of 1974). However, we decline to read § 1018's language "according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 519 U.S. 316, 117 S. Ct. 832, 843, 136 L.Ed.2d 791 (Scalia, J., concurring). Rather, in determining whether state oil-spill prevention laws "respect" or "relate to" the "discharge of oil," we must look to the "objectives" of OPA 90. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 655-56, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995) (in determining scope of clause preempting "all state laws insofar as they . . . *relate to* any employee benefit plan," courts must "look to the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive") (emphasis added). Because one of the explicit "objectives" of OPA 90 is oil-spill prevention, *see* OPA 90 §§ 2701-2718 (Title IV—Oil Spill Prevention), § 1018 prevents anything in OPA 90 from preempting state laws in this field.

III

OPA 90 is not the only federal statute that regulates tanker vessels, however. Other such statutes include the Port and Tanker Safety Act of 1978 ("PTSA"), *see* Pub. L. No. 95-474, 92 Stat. 471, the Ports and Waterways Safety Act of 1972 ("PWSA"), *see* Pub. L. No. 92-340, 86 Stat. 424, and the Tank Vessel Act of 1936, *see* Pub. L. No. 74-765, 49 Stat. 1889. The United States contends that even if OPA 90 does not preempt the challenged BAP Regulations because of the savings clause in § 1018, these other federal statutes do.

In response, the state defendants maintain that, by its plain language, the savings clause of § 1018 applies not only to OPA 90 but to the other federal tanker regulation statutes as well. The plain language of § 1018 cannot bear this interpretation. Section 1018 says that nothing "in *this Act*"[7] preempts state authority to impose additional requirements. *See* 33 U.S.C. § 2718(a), (c). Thus, § 1018 does not explicitly address whether state oil-spill prevention rules may be preempted by federal "Acts" *other than* OPA 90.

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[7] Section 1018 refers to "the Act of March 3, 1851" as well as "this Act." The 1851 Act is a limitation of liability statute that permits a party to enjoin all pending suits and to compel them to be filed in a special limitation proceeding. It is undisputed that the 1851 Act is not relevant to this appeal.

The state defendants also contend that, because OPA 90 amends the PWSA, the PTSA, and the Tank Vessel Act, the savings clause of § 1018 need not expressly refer to those Acts to prevent them from preempting state law. However, the state defendants do not, and could not, offer any authority for the proposition that a savings clause in an Act that amends another Act *necessarily* applies to the amended Act, even when the savings clause expressly refers to "*this* Act." Although OPA 90 amended prior federal statutes, § 1018 by its plain language has no automatic impact on preemption caused by those statutes.

IV

Because § 1018 of OPA 90 does not by its plain language affect preemption by federal Acts other than OPA 90, we must determine whether such Acts otherwise impliedly or expressly preempt the BAP Regulations. The Supreme Court has recognized three types of preemption: conflict preemption, field preemption, and express preemption.[8] *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992). Conflict preemption occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S. Ct. 1661, 104 L.Ed.2d 86 (1989) (citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85

[8] As the Supreme Court observed in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990), these categories are not "rigidly distinct." *Id.* at 79 n.5, 110 S. Ct. 2270.

L.Ed. 581 (1941)). Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146 (1947)). Finally, express preemption exists when Congress explicitly states its intent to displace state law in the statute's language. *See Cipollone*, 505 U.S. at 516, 112 S. Ct. 2608. The issues of conflict, field, and express preemption were all raised by Intertanko in district court and are raised again on appeal.

A

We first examine whether the BAP Regulations are subject to conflict preemption. Conflict preemption exists "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. at 100-01, 109 S. Ct. 1661 (quoting *Hines*, 312 U.S. at 67, 61 S. Ct. 399). Intertanko does not argue that compliance with both federal law and the BAP Regulations is impossible; rather, Intertanko contends that the BAP Regulations interfere with "the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67, 61 S. Ct. 399.

1

Congress's first effort in the field of tanker regulation was the Tank Vessel Act, passed in 1936. *See* Pub. L. No. 74-765, 49 Stat. 1889. The Tank Vessel Act "sought to effect a 'reasonable and uniform set of rules and regulations concerning ship construction . . .,'"

Ray v. Atlantic Richfield Co., 435 U.S. 151, 166, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978) (quoting H.R. Rep. No. 74-2962, at 2 (1936)).

In 1972, the Tank Vessel Act was significantly expanded by the Ports and Waterways Safety Act ("PWSA"), *see* Pub. L. No. 92-340, 86 Stat. 424, which "subjects to federal rule the design and operating characteristics of oil tankers." *Ray*, 435 U.S. at 154, 98 S.Ct. 988. The PWSA contains two Titles. Title I is concerned with controlling tanker traffic. *See id.* at 161, 98 S. Ct. 988. Title I authorizes the Coast Guard to "specify[] the times for vessel movement, [to] establish[] size and speed limitations and vessel operating conditions, and [to] restrict[] vessel operation to those vessels having the particular operating characteristics which [it] considers necessary for safe operation under the circumstances." *Id.* at 169-70, 98 S.Ct. 988. Whereas Title I of the PWSA focuses on tanker traffic, Title II of the Act is concerned with tanker design, construction, and operation. As the Supreme Court explained in *Ray*, whereas Title II can be "compare[d] to 'providing safer surface highways and traffic controls for automobiles,' . . . Title II [may be] likened to 'providing safer automobiles to transit those highways.'" *Id.* at 161 n.9, 98 S. Ct. 988 (quoting S. Rep. No. 92-724, at 9-10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2766, 2769).

In 1978, the PWSA and Tank Vessel Act were supplemented by the Port and Tanker Safety Act ("PTSA"). *See* Pub. L. No. 95-474, 92 Stat. 1471. The PTSA requires the Secretary of Transportation to establish regulations addressing vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning,

work hours, pilotage, and language requirements. *See* 46 U.S.C. §§ 9101, 9102.

The federal tanker regulation scheme was again substantially altered when Congress passed OPA 90. *See* Pub. L. No. 101-380, 104 Stat. 484. Enacted following the Exxon Valdez oil spill, OPA 90 addresses oil-pollution prevention, removal, liability, and compensation. *See* 33 U.S.C. § 2701, *et. seq.* OPA 90 imposed a number of new federal oil-spill prevention requirements, including: random drug and alcohol testing, *see* 46 U.S.C. § 7702; a provision mandating that working hours on a tanker be no more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, *see* 46 U.S.C. § 8104(n); and a requirement that tankers be equipped with double hulls, *see* 46 U.S.C. § 3703a.

Intertanko maintains that the BAP Regulations frustrate the purposes and objectives of Congress in adopting this legislative scheme. We disagree. In determining "the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S. Ct. 399, we must look not to the purposes and objectives of any single Act, but instead to Congress's overarching purposes and objectives in the relevant legislative field. *See California v. ARC America Corp.*, 490 U.S. at 102, 109 S.Ct. 1661 ("Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the *federal antitrust laws*. . . ."") (citing cases involving both Sherman Act and Clayton Act) (emphasis added). In the field of tanker regulation, the overarching purposes

of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reflects "the *full* purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S. Ct. 399 (emphasis added), better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

As explained above, § 1018 of OPA 90 does not *expressly* apply to other federal "Acts." However, the enactment of a new federal statute in a particular legislative field may influence whether state laws in that field "frustrate the *full* purposes and objective of Congress." *Hines*, 312 U.S. at 67, 61 S. Ct. 399 (emphasis added). This is true even if the new statute contains a non-preemption clause which does not address other statutes in the field, *cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S. Ct. 1483, 131 L.Ed.2d 385 (1995) (existence of statutory provision containing "express definition of the pre-emptive reach of a statute . . . does not mean that the express clause entirely forecloses any possibility of implied pre-emption"), or does not contain a non-preemption clause at all, *see California v. ARC America Corp.*, 490 U.S. at 102, 109 S.Ct. 1661. Section 1018 of OPA 90 sheds considerable light upon the purposes and objectives of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation. Accordingly, we decline Intertanko's invitation to strike down the challenged BAP Regulations in their entirety on the ground that they frustrate Congress's purposes and objectives in enacting OPA 90, the PWSA, the PTSA, and the Tanker Safety Act.

2

Intertanko next contends that the BAP Regulations frustrate the purposes and objectives of Congress because they conflict with various international treaties. These treaties include: the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546; the Multilateral International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377; and the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.[9]

As the Supreme Court observed in *Hines*, in determining whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . it is of importance that [the state] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 67-68, 61 S. Ct. 399. States have no power to override international agreements entered into by the federal government. *See Zschernig v. Miller*, 389 U.S. 429, 441, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968).

Intertanko's argument that the BAP Regulations are preempted by these international treaties is under-

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[9] Despite being a signatory, the United States has not ratified the United Nations Convention on the Law of the Sea.

mined by our decision in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984). In *Chevron*, we held that an Alaska statute that prohibited tankers from discharging ballast into the territorial waters of Alaska was not preempted by either federal statute or international agreement. *See Chevron*, 726 F.2d at 485. We stated:

> [T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statute nonetheless gives the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*

Id. at 493-94 (citations omitted) (emphasis added).

Passage of OPA 90 by Congress only reinforces this court's conclusions in *Chevron* that "strict international uniformity" with respect to the regulation of tankers is not "mandate[d]" by federal law and that "international agreements set only minimum standards." *Id.* at 493. To reach any other conclusion, we would have to read § 1018 to provide that the Act permits state tanker regulation only when the field in question is not subject to international regulation. However, § 1018 plainly states that nothing in the Act shall be interpreted to prohibit states from imposing "*any* additional liability or requirements," 33 U.S.C. § 2718(a) (emphasis added),

not merely "additional liability or requirements where such requirements would not conflict with an international treaty."

3

The United States raises for the first time on appeal two arguments concerning specific conflicts between the BAP Regulations and international treaties. These arguments are: (1) that the BAP Regulations interfere with the international right of "innocent passage," *see* United Nations Convention on the Law of the Sea, Dec. 10, 1982, § 3, arts. 17-25, 21 I.L.M. 1261, 1273- 75; and (2) that the BAP Regulations conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca at the entrance to Puget Sound, *see* The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377. Generally, we will not consider arguments that are raised for the first time on appeal. *See Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990); *Abex Corp. v. Ski's Enters., Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). The court has discretion to address such arguments only: (1) "in the 'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) (quoting *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983)); (2) "when a new issue arises while appeal is pending because of a change in the law," *id.*; or (3) "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed," *id.*

In support of its claim that we may exercise our discretion to address its new arguments, the United States cites our decision in *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996), in which we considered a Supremacy Clause argument raised for the first time on appeal. *See id.* at 1126. In *Kimes*, however, we noted that the issue was "purely a question of law" and that "consideration of the issue would not prejudice [the opposing party's] ability to present relevant facts that could affect our decision." *Id.* By contrast, the state defendants have not had the opportunity to develop the record concerning whether the BAP Regulations practically impair the right of innocent passage or are enforced in a manner that is inconsistent with the bilateral agreement with Canada covering traffic in the Strait of Juan de Fuca. Accordingly, we do not consider the United States's new treaty-based arguments on appeal.[10]

B

Intertanko next argues that federal regulation of oil tankers by OPA 90, the PWSA, the PTSA, and the Tank Vessel Act is so comprehensive as to preempt impliedly the field of tanker regulation. Field preemption exists when federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn.*, 458 U.S. at 153, 102 S. Ct. 3014 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230, 67 S. Ct. 1146). The leading case on the subject of field preemption of state statutes that

[10] The United States does not assert that we have discretion to entertain its new arguments on miscarriage-of-justice grounds or because of a post-appeal change in the law.

regulate tankers is *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). In *Ray*, the Supreme Court examined the preemptive effect of the PWSA on the Washington Tanker Law, 1975 Wash. Laws ch. 125, a statute that required various design-safety features for tankers operating in Puget Sound. The Court found that certain safety features imposed by the Washington Tanker Law were preempted, but that others were not. *See Ray*, 435 U.S. at 160, 168, 173, 178, 180, 98 S. Ct. 988.

1

One of the provisions of the Washington Tanker Law addressed in *Ray* required oil tankers weighing between 40,000 and 125,000 deadweight tons to possess certain safety features, including a minimum amount of horsepower, twin screws, two radars, and double hulls. *See id.* at 160, 98 S. Ct. 988. After a thorough examination of the regulatory scheme established by Title II of the PWSA, the Court found that these state requirements were impliedly preempted. *See id.* at 168, 98 S. Ct. 988. However, this finding of implied preemption was limited to the field of tanker "design and construction." *Id.* at 163- 64, 98 S. Ct. 988. The Court stated:

> This statutory pattern shows that Congress, insofar as *design characteristics* are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for *design and construction* of tankers that would foreclose the imposition of different or more stringent state require-

> ments. In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's *design and construction* regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its *design characteristics* constitute an undue hazard.

Id. (emphasis added); *see also id.* at 165, 98 S. Ct. 988 ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the *design* of oil tankers.") (emphasis added); *id.* at 166, 98 S. Ct. 988 ("That the Nation was to speak with one voice *with respect to tanker-design standards* is supported by the legislative history of Title II . . . .") (emphasis added); *id.* at 166 n.15, 98 S.Ct. 988 ("The Court has previously observed that ship *design and construction* are matters for national attention.") (emphasis added); *id.* at 168 n.19, 98 S. Ct. 988 ("Here it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement, with vessels having *design characteristics* satisfying federal law being privileged to carry tank-vessel cargoes in United States waters.") (emphasis added).

The *Ray* Court next proceeded to examine a provision of the Washington Tanker Law mandating tug escorts for any vessel that did not have the safety features required by the Tanker Law's other provisions. *See id.* at 171, 98 S. Ct. 988. The Court began its analysis of the tug-escort requirement by observing

that a tanker's certification "under federal law as a vessel safe insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69, 98 S. Ct. 988. The Court noted that the Washington Tanker Law's tug escort provision was "not a design requirement," but instead was "more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171, 98 S. Ct. 988. The Court further observed that "[t]he relevant inquiry . . . with respect to the State's power to impose a tug-escort rule is . . . whether the [Coast Guard] has either promulgated [its] own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Id.* at 171-72, 98 S. Ct. 988. The Court concluded that because the Secretary had not imposed such a requirement, "the State's requirement need not give way under the Supremacy Clause." *Id.* at 172, 98 S. Ct. 988. These excerpts from *Ray* teach that "operating rule[s]," *id.* at 171, 98 S. Ct. 988, unlike design and construction requirements, are not automatically subject to field preemption by the PWSA. Attempting to distinguish *Ray*, Intertanko argues that *Ray*'s analysis of "operating rule[s], *id.*, applies only to those requirements that "aris[e] from the peculiarities of local waters." *Id.* This argument fails to recognize, however, that the operating requirements imposed by the BAP Regulations are designed for the same "local waters," namely Puget Sound, as was the Washington Tanker Law contested in *Ray*.

Intertanko also maintains that *Ray* used the phrase "design and construction" as a "shorthand" for all Title II PWSA matters, which include tanker operations as well as design and construction. Intertanko's interpretation of *Ray*, however, is plainly inconsistent with our own interpretation of the same case in *Chevron*. In *Chevron*, we stated:

> The [*Ray*] Court's finding of preemption is *specifically limited to the regulation of vessel "design characteristics"* and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, *the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications."*

Chevron, 726 F.2d at 487 (citations omitted) (quoting *Ray*, 435 U.S. at 168-69, 98 S. Ct. 988) (emphasis added). We concluded in *Chevron* that "deballasting" does not qualify as "design or construction" and that, consequently, deballasting regulations were not automatically preempted under *Ray*. *Id.* Because the discharge of ballast involves an "operation" directly related to the sailing of a tanker,[11] *Chevron* undermines Intertanko's argument that the *Ray* Court used "design

[11] As we observed in *Chevron*:

> Unloaded oil tankers must take on seawater for ballast to ensure proper submergence and vessel stability. Upon arrival in port, the tankers must then discharge this ballast—i.e., "deballast"—before loading their cargo tanks with oil.

Chevron, 726 F.2d at 485.

and construction" as "shorthand" for "design, construction, and operations."

Virtually all of the challenged BAP Regulations impose operational requirements rather than design and construction requirements. These operational requirements include: accident reporting, *see* Wash. Admin. Code § 317-21-130; watch practices, *see* Wash. Admin. Code § 317-21-200; navigation procedures, *see* Wash. Admin. Code § 317-21-205; engineering procedures, *see* Wash. Admin. Code § 317-21-210; prearrival tests and inspections, *see* Wash. Admin. Code § 317-21-215; emergency procedures, *see* Wash. Admin. Code § 317-21-220; rules against altering or destroying records, *see* Wash. Admin. Code § 317-21-225; training programs, *see* Wash. Admin. Code § 317-21-230; illicit drugs and alcohol use, *see* Wash. Admin. Code § 317-21-235; personnel evaluation, *see* Wash. Admin. Code § 317-21-240; work hours, *see* Wash. Admin. Code § 317-21-245; language requirements, *see* Wash. Admin. Code § 317-21-250; training records for crew members, *see* Wash. Admin. Code § 317-21-255; management, *see* Wash. Admin. Code § 317-21-260; and advance notice of entry and safety reports, *see* Wash. Admin. Code § 317-21-540. Because these regulations do not qualify as "design and construction" requirements, they are not automatically subject to field preemption under *Ray*.

2

We reach a different conclusion with respect to Wash. Admin. Code § 317-21-265, however.[12] The first

[12] Wash. Admin. Code § 317-21-265 provides, in full:

(1) Navigation Equipment. An oil spill prevention plan for a tank vessel must describe navigation equipment used on a vessel covered by the plan which includes:

(a) Global positioning system (GPS) receivers; and

(b) Two separate radar systems, one of which is equipped with an automated radar planning aid (ARPA).

(2) Emergency towing system. Tankers must be equipped with an emergency towing system on both the bow and stern within two years from the effective date of this chapter. The emergency towing system comprises:

(a) Designated strong points able to withstand the load to which they may be subjected during a towing operation in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet);

(b) Appropriate chafing chains, towing pennant, tow line and connections of a size and strength to tow the tanker fully laden in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet); and

(c) Appropriately sized and colored marker buoys attached to the towing pennants.

(3) The emergency towing system must be deployable:

(a) In 15 minutes or less by at most two crew members;

(b) From the bridge or other safe location when the release points are inaccessible; and

(c) Without use of the vessel's electrical power.

subsection of that provision, entitled "Navigation Equipment," requires tankers to possess global positioning system ("GPS") receivers, as well as two separate radar systems. *See* Wash. Admin. Code § 317-21-265(1). The navigational equipment requirements imposed therein are virtually indistinguishable from the radar and navigation devices that the *Ray* Court found to be regulated preemptively by the PWSA. The Washington Tanker Law challenged in *Ray* required "[t]wo radars in working order and operating, one of which must be collision avoidance radar." *Ray*, 435 U.S. at 160, 98 S. Ct. 988. The *Ray* Court, after reviewing the requirements of the Washington Tanker Law, including the radar and navigational equipment requirements, stated that "the *foregoing design requirements*, standing alone, are invalid in light of the PWSA and its regulatory implementation." *Id.* at 160-61, 98 S.Ct. 988 (emphasis added). Because the GPS and radar requirements are virtually identical to the navigational equipment required by the Washington Tanker Law, *Ray* dictates that Wash. Admin. Code § 317-21-265(1) must also be classified as a "design requirement[]." *Id.* at 160-61, 98 S. Ct. 988. Applying *Ray*, we hold that Wash. Admin. Code § 317-21-265(1) is preempted by the PWSA.

In support of its conclusion that the navigational equipment rules imposed by Wash. Admin. Code § 317-21-265(1) are not "design requirements" subject to preemption under *Ray*, the district court stated that "[t]he requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223," and therefore "are not subject to implied pre-

emption." *Intertanko*, 947 F. Supp. at 1495 n.9. Regardless of whether radar and other navigational systems "should" be considered "equipment necessary for vessel operating procedures," the Supreme Court considered them "design requirements." *Ray*, 435 U.S. at 160-61, 98 S. Ct. 988. We are bound by the *Ray* Court's classification of these devices as "design requirements," and by its conclusion that, as such, they are impliedly preempted by the PWSA. *See id.*

The second requirement imposed by Wash. Admin. Code § 317-21-265 is that all ships be equipped with an emergency towing package. *See* Wash. Admin. Code § 317-21-265(2). The state defendants contend that the towing package provision is "not a design or construction requirement," but rather a "requirement to have certain equipment installed on a tanker," and that, consequently, this provision is not preempted under *Ray*. However, the state defendants' argument fails to recognize that "design requirements" and "equipment requirements" are not mutually exclusive. *See Chevron*, 726 F.2d at 500 ("Alaska has left all *designing of vessels and equipment* to the Coast Guard and has only prohibited the discharge of polluted ballast.") (emphasis added). Section 317-21-265(2) provides that towing equipment must meet several specific design standards. These standards include "[d]esignated strong points," Wash. Admin. Code § 317-21-265(2)(a), and "[a]ppropriate chafing chains, towing pennant, tow line and connections," Wash. Admin. Code § 317-21-265(2)(b), all of which must be capable of withstanding "sustained winds of forty knots and sea or swell of five and a half meters," Wash. Admin. Code § 317-21-265(2)(a), (b). Because such design requirements are preempted by the PWSA, *see Ray*, 435 U.S. at 160-61,

98 S. Ct. 988, we hold that the emergency towing package requirement, like the GPS and radar requirements, is invalid under the Supremacy Clause.

C

We finally address whether any of the BAP Regulations are *expressly* preempted by federal law. In *Ray*, the Supreme Court held that, because the challenged tug-escort rule was not a design or construction requirement, "[t]he relevant inquiry . . . with respect to the State's power to impose [the] tug-escort rule is . . . whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-72, 98 S. Ct. 988. *Ray* thus teaches that once a court has determined that state tanker regulations are not subject to implied preemption as "design and construction" requirements, the court still must examine whether the state regulations are expressly preempted. Accordingly, having determined that all of the BAP Regulations except Wash. Admin. Code § 317-21-265 are not subject to implied preemption as design and construction requirements, we must now inquire whether those regulations are subject to express preemption.

Intertanko contends that some of the BAP Regulations are expressly preempted not by any federal statute but by a variety of federal regulations issued by the Coast Guard. A federal agency, acting through its rulemaking processes, can effect preemption of state law. *See Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-54, 102 S.Ct. 3014. Indeed, "[f]ederal regulations have no less pre-emptive effect than federal statutes."

Id. at 153, 102 S. Ct. 3014. According to Intertanko, certain of the BAP Regulations are expressly preempted by Coast Guard statements accompanying the issuance of federal regulations concerning watch practices, *see* 58 Fed. Reg. 27,268, 27,632 (1993); steering gear for vessels underway, *see* 60 Fed. Reg. 24,767, 24,771 (1995); and drug and alcohol testing, *see* 58 Fed. Reg. 68,274, 68,277 (1993).[13]

Preemption by regulations enacted by a federal agency does not occur if that agency is acting beyond the scope of its delegated powers. As the Supreme Court explained in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986):

> [A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.
>
> . . . .
>
> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would

[13] Intertanko also contends that Wash. Admin. Code § 317-21-265 (navigation equipment and emergency towing system) is preempted by a Coast Guard regulation concerning on-board towing equipment. *See* 58 Fed. Reg. 67,988, 67,993 (1993). Because we hold that Wash. Admin. Code § 317-21-265 is invalid under *Ray*, we need not address this argument.

> be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Id. at 374-75, 106 S. Ct. 1890; *see also United States v. Shimer*, 367 U.S. 374, 381-82, 81 S. Ct. 1554, 6 L.Ed.2d 908 (1961) (administrative agency cannot preempt state law if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

Louisiana Public Service Commission teaches that the relevant inquiry in determining whether a federal regulation preempts state law is whether the agency "is acting within the scope of its congressionally delegated authority." *Id.* at 374, 81 S. Ct. 1554. When it passed OPA 90, Congress required the Coast Guard to implement a wide range of oil-spill prevention rules. *See* 33 U.S.C. §§ 2701-2718. However, Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law. Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements.[14] *See* 33 U.S.C. § 2718. In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate

[14] Although § 1018 expressly applies only to OPA 90, it shapes the "full purposes and objectives" of Congress, *Hines*, 312 U.S. at 67, 61 S. Ct. 399, with respect to the entire legislative field of oil-spill prevention. *See* Part IV.A.1, *infra*. Accordingly, we hold that the Coast Guard impermissibly acts beyond its "congressionally delegated authority," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S. Ct. 1890, not only when it purports to preempt state oil-spill prevention laws under the authority of OPA 90, but also when it purports to do so under the authority of other federal statutes.

power to the Coast Guard to do so. Therefore, we reject Intertanko's position that the Coast Guard was "acting within the scope of its congressionally delegated authority," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, 106 S.Ct. 1890, in enacting regulations that purport to preempt state law.

V

Intertanko next contends that the BAP Regulations violate the Commerce Clause. The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several states. . . ." U.S. Const., art. I, § 8. Although this clause by its express terms serves only as an affirmative grant to the federal government of the power to regulate interstate commerce, it has also been interpreted by the Supreme Court to impose limits on the ability of the states to do so. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590, 1596, 137 L.Ed.2d 852 (1997).

The Supreme Court has distinguished between two types of impermissible state regulations that incidentally burden interstate commerce. A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970). However, when a regulation "clearly" discriminates against interstate commerce, it violates the Commerce Clause unless the discrimination is demonstrably justified by a valid factor unrelated to state protectionism. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 117 L.Ed.2d 1 (1992). In *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994), this court summarized the proper analysis as follows:

> If the regulations discriminate in favor of in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. In contrast, if the regulations apply evenhandedly to in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits.

Id. at 1012 (citations omitted).

Intertanko asserts that the cost for a tanker operator to develop an oil-spill prevention plan that meets the standards established by the BAP Regulations is approximately $12,000. However, Intertanko fails to point to any evidence in the record to establish that this "incidental burden[] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits." *Id.* Nor does Intertanko even argue that the BAP Regulations "discriminate in favor of in-state interests." *Id.* Therefore, Intertanko's contention that the BAP Regulations violate the Commerce Clause is without merit.

VI

Finally, Intertanko maintains that the BAP Regulations impermissibly intrude upon the foreign affairs power of the federal government. The Constitution entrusts the administration of foreign affairs to the President and to Congress. *See Zschernig v. Miller*, 389 U.S. 429, 432, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968). Accordingly, "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional." *Id.*

The only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power is *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L.Ed.2d 683 (1968). *Zschernig* involved an Oregon statute providing that a nonresident alien could not inherit from an Oregon decedent unless certain conditions were met. *See id.* at 440, 88 S. Ct. 664. The Supreme Court struck down the Oregon statute on the ground that it had "more than 'some incidental or indirect effect in foreign countries.'" *Id.* at 434, 88 S. Ct. 664 (quoting *Clark v. Allen*, 331 U.S. 503, 516-17, 67 S. Ct. 1431, 91 L.Ed. 1633 (1947)).

By their own terms, the BAP Regulations apply only to vessels operating within Washington's territorial limits. *See* Wash. Rev. Code § 88.46.010. Intertanko objects to the potential *extraterritorial* impact of requirements that: (1) owners report hazardous events regardless of whether the events occur outside of Washington, *see* Wash. Admin. Code § 317-21-130; (2) crew training and drill programs be conducted, *see* Wash. Admin. Code § 317-21- 230; (3) personnel and record keeping procedures be administered, *see* Wash.

Admin. Code § 317-21-255; and (4) owner and operations management programs be followed, *see* Wash. Admin. Code § 317-21-260. However, Intertanko has failed to demonstrate that, even if these regulations have some extraterritorial impact, that impact is more than "incidental or indirect." *Zschernig*, 389 U.S. at 434, 88 S. Ct. 664. Accordingly, we reject Intertanko's argument that the BAP Regulations infringe upon the foreign affairs power of the federal government.

VII

We affirm in part and reverse in part the district court's grant of summary judgment in favor of the State of Washington. We reverse the district court's holding that Wash. Admin. Code § 317-21-265 is not preempted by federal law. However, we affirm the district court's judgment as to all other challenged BAP Regulations. Each side shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35010

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF-APPELLANT

AND

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON; CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; BARBARA J. HERMAN, ADMINISTRATOR OF THE STATE OF WASHINGTON OFFICE OF MARINE SAFETY; DAVID MACEACHERN, PROSECUTOR OF WHATCOM COUNTY; K. CARL LONG, PROSECUTOR OF SKAGIT COUNTY; JAMES H. KRIDER, PROSECUTOR OF SNOHOMISH COUNTY; NORMAN MALENG, PROSECUTOR OF KING COUNTY, DEFENDANTS-APPELLEES

AND

NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL; OCEAN ADVOCATES, INTERVENORS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Nov. 24, 1998]

ORDER

Before: BROWNING and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge.

Prior report: 148 F.3d 1053

The panel has unanimously voted to deny the petitions for rehearing. Judge Browning and Judge O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Marquez so recommends.

The full court was advised of the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

GRABER, Circuit Judge, dissenting:

I respectfully dissent from the court's decision not to rehear this case en banc.

This is the first published appellate decision interpreting the preemptive effect of the Oil Pollution Act of

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* The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

1990 (OPA 90). The preemptive effect of OPA 90 is an issue of exceptional importance to the coastal states within the Ninth Circuit. *See* Fed. R. App. P. 35(a)(2) (providing that en banc consideration is appropriate "when the proceeding involves a question of exceptional importance").[1]

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[1] *See also* Sarah A. Loble, *Intertanko v. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. Mar. L.J. 27, 72 (1997) ("The Ninth Circuit has the opportunity to remedy the imbalance created by the district court, which favored Washington state regulation at the expense of federal interests."); Charles L. Coleman, III, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. Mar. L.J. 305, 356 (1997) ("To the extent that the recent decision of the U.S. District Court for the Western District of Washington in *Intertanko v. Lowry* is inconsistent with the foregoing conclusions, it is wrong in this author's view, and should be overturned in the pending appeal to the Ninth Circuit Court of Appeals.") (footnote omitted); Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger Williams U. L. Rev. 363, 396 (1997) ("The court attempted to counter Intertanko's preemption argument by simply asserting that Intertanko's theory was largely foreclosed by the nonpreemptive language of OPA '90. In light of the preceding discussion this reasoning seems unpersuasive.") (citation, footnote, and internal quotation marks omitted); Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case W. Res. L. Rev. 1, 17 n.59 (1997) ("Congress seems to have had a somewhat more restrictive view of what was being preempted than did the district court in *Intertanko*."); Michael P. Mullahy, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 Hofstra L. Rev. 607, 636-37 (1996) ("The issue of whether Washington state has the power to enact the BAP Standards will most likely be decided by the Supreme Court. . . . [T]he Washington BAP Standards should survive the constitutional analysis the Court will most likely perform.") (footnote omitted); Laurie L. Crick, *The Washington State BAP Standards: A Case Study in Aggressive Tanker Regulation*, 27 J. Mar. L. & Com. 641, 646 (1996) ("[I]t is possible that most, if not all, of the BAP Standards will be upheld."); Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J. 1, 26 (1995) ("The current controversy over Washington's navigational regulations affecting oil pollution implicates some of the most fundamental principles of our republic and foreshadows an age-old conflict between federalism and states' rights.").

Additionally, although I do not suggest that the Washington regulations necessarily are invalid, the opinion's analysis is incorrect in two exceptionally important respects: (1) The opinion places too much weight on two clauses in Title I of OPA 90 that limit OPA 90's preemptive effect. (2) Portions of the opinion that discuss the Coast Guard regulations are inconsistent with Ninth Circuit and Supreme Court precedent. Those issues warrant en banc consideration even if the opinion's ultimate result proves to be correct, a question as to which I express no view.

APPLICATION OF OPA 90'S PREEMPTION CLAUSES

Congress enacted OPA 90 in response to the Exxon Valdez oil spill. OPA 90 combined numerous bills into one comprehensive Act with nine titles. Title IV contains measures designed, in part, to *prevent* oil spills, while Title I regulates *liability and compensation* for oil spills. Congress placed the two pertinent preemption provisions in Title I. Those provisions state:

> Nothing in this Act or the Act of March 3, 1851 shall—
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or

political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

Section 1018(a) of OPA 90 (codified at 33 U.S.C. § 2718(a)).

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Section 1018(c) of OPA 90 (codified at 33 U.S.C. § 2718(c)).

The opinion reasons that the "plain language" of those preemption clauses indicates that Congress intended for them to apply to the oil spill prevention measures in Title IV. *See The International Assoc. of Indep. Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1060 (9th Cir. 1998) ("By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well."). *See also Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir. 1998) ("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent."). The opinion bases its "plain language" holding on Congress' use of the term "this Act" in discussing the reach of the clauses. *Intertanko*, 148 F.3d at 1060. That reasoning is incomplete.

The term "this Act" does plainly indicate Congress' intention to embrace all of OPA 90. However, examining the term "this Act" does not end the analysis. Grammatically, because of its placement in the sentences that comprise the preemption clauses, the term says only that "[n]othing in this Act" shall affect certain things—but we still must consider the meaning of those certain things that "[n]othing in this Act" is allowed to affect. At their broadest, the preemption clauses provide that "[n]othing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." § 1018(c).

That phrase, read as a whole, is ambiguous, because it plausibly can be understood in two ways. One

plausible way to read the phrase is that any state regulation designed to prevent an oil spill is a "requirement[] . . . relating to the discharge, or substantial threat of a discharge, of oil," because in the broadest sense a preventive measure "relates" to the thing being prevented. Another plausible way to read the phrase, however, is to embrace only state regulations that impose "requirements" pertaining specifically "to the discharge, or substantial threat of a discharge, of oil" once it has occurred. That is, if a discharge is being prevented, there never comes into being a "discharge, or substantial threat of a discharge, of oil." Under the latter, narrower reading, a preventive measure does not relate to an oil "discharge, or substantial threat of a discharge," because its very purpose is to *avert* an oil discharge, or substantial threat of discharge, and the specified condition of the sentence is never met.

In summary, Congress could have intended to allow any state regulation that might prevent an oil spill, or Congress could have intended a more limited reach. The opinion acknowledges the ambiguity in this provision, which it resolves by analyzing the objectives of Congress. *See Intertanko*, 148 F.3d at 1060 n.6 ("Like the phrase 'relating to' employed in § 1018(c), the phrase 'with respect to' used in § 1018(a) is clearly expansive. However, we decline to read § 1018's language according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to everything else. Rather, in determining whether state oil-spill prevention laws 'respect' or 'relate to' the 'discharge of oil,' we must look to the objectives of OPA 90. Because one of the explicit objectives of OPA 90 is oil-spill prevention, § 1018

prevents anything in OPA 90 from preempting state laws in this field.") (citations and internal quotation marks omitted).

Contextual clues suggest, however, that Title I's preemption clauses do not apply to Title IV's prevention provisions. *See Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998) ("the meaning of statutory language, plain or not, depends on context") (citation and internal quotation marks omitted), *cert. denied*, 1998 WL 467389 (U.S. Nov. 9, 1998) (No. 98-237). First, Congress placed these preemption clauses in a Title that addresses only *liability and compensation* for oil spills that actually occur. That placement (especially considering the full wording of the clauses) suggests that Congress intended for the clauses to apply only to the provisions in that Title. A second contextual clue strengthens that inference: A separate section in Title IV contains its own preemption clause. *See* § 4202(c) (Title IV), codified at 33 U.S.C. § 1321(o)(2).[2] Moreover, sections in other Titles of OPA 90 include their own preemption provisions as well. *See* § 5002(n) (Title V), codified at 33 U.S.C

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[2] In section 4202(c), OPA 90 amended 33 U.S.C. § 1321(o)(2), a preexisting provision of the Federal Water Pollution Control Act. The amendment is emphasized below.

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, *or with respect to any removal activities related to such discharge.*

2732;[3] § 8202 (Title VIII), codified at 43 U.S.C. § 1656(e).[4] There would have been little or no need for additional preemption clauses if the clauses in Title I were comprehensive. Indeed, the opinion's broad reading of the preemption clauses in § 1018 would render the other OPA 90 preemption provisions largely superfluous, a result that this court generally avoids. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("We have long followed the principle that statutes should not be construed to make surplusage of any provision.") (citation and internal quotation marks omitted).

Context, however, does not resolve the textual ambiguity definitively. In the face of an ambiguity not resolved by examining text and context, this court generally turns to a statute's legislative history. *See*

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[3] Section 5002(n) provides in part:

> Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development.

[4] Section 8202(e) provides:

> (1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.
>
> (2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998), *as amended* 1998 WL 727476, at *3 (9th Cir. 1998) (in construing a federal statute's preemptive effect, noting the general principle that resort to legislative history is appropriate when Congress' intent is not clear from an examination of the statutory text). *See also Moyle v. Director, Office of Workers' Compensation Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted). Here, the legislative history is of value.

OPA 90's preemption clauses originated in the Senate's Oil Pollution Liability and Compensation Bill of 1989.[5] The Senate intended for that bill to "con-

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[5] The original draft provided:

> (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State. Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.
>
> (b) Nothing in this Act or in section 9507 of the Internal Revenue Code of 1954 shall in any way affect, or be construed to affect, the authority of any State—
>
> (1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or
>
> (2) to require any person to contribute to such a fund.

solidate and improve Federal laws providing compensation and establishing liability for oil spills." S. Rep. No. 101-94, at 1 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723. That bill did not include Title IV's oil pollution prevention provisions at all. *See* 135 Cong. Rec. S3241-46 (daily ed. Apr. 4, 1989).

The Senate drafted a separate bill, the Oil Tanker Navigation Safety Bill of 1989, that included provisions regarding the prevention of oil spills, including some provisions similar to those that eventually appeared in Title IV. *See* S. Rep. No. 101-99, 3-4 (1989), *reprinted*

(c) A State may enforce, on the navigable waters of such State, the requirements for evidence of financial responsibility applicable under section 104 of this Act.

(d) The President shall consult with the affected State or States on the appropriate removal action to be taken. Removal with respect to any discharge or incident shall be considered completed when so determined by the President and the Governor or Governors of the affected State or States.

(e) Nothing in this Act, the Act of March 3, 1851, as amended (46 U.S.C. 183 et seq.), or section 9507 of the Internal Revenue Code of 1954, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law,

relating to the discharge, or substantial threat of a discharge, of oil.

135 Cong. Rec. S3245 (daily ed. Apr. 4, 1989).

in 1990 U.S.C.C.A.N. 752.[6] That bill contained its own preemption clause. *See* 135 Cong. Rec. S9332 (daily ed. Aug. 2, 1989).[7] *See* also S. Rep. No. 101-99, at 21, *reprinted in* 1990 U.S.C.C.A.N. at 770.

The Senate added some of the preventive provisions from the Oil Tanker Navigation Safety Bill to the Oil Pollution Liability and Compensation Bill. *See* 135 Cong. Rec. S9678 (daily ed. Aug. 3, 1989); 135 Cong. Rec. S10406-07 (daily ed. Aug. 15, 1989). Specifically, the Senate added the provisions relating to alcohol testing and crew placement, which it put in Title III. *See* 135 Cong. Rec. S10406. The Senate also added the preemption clause from the Oil Tanker Navigation Safety Bill to that Title (§ 310), and it limited the reach of the preemption clause to the oil spill prevention provisions in that Title. *See id.* at S10415-S10417.[8] That modified bill did not alter the Oil Pollution Liability and Compensation Bill's preexisting preemption clauses found in the oil spill *liability and compensation*

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[6] Specifically, Title III of that bill included provisions requiring (a) alcohol testing of tanker personnel and (b) the placement of four crew members on the navigation bridge of a tanker. *Id.*

[7] That clause provided:

Nothing in this Act shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill liability or contingency response planning and activities in State waters.

[8] Section 310 provided:

Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers in State waters.

Id. at S10417.

title of the amended bill (Title I, Section 106). *Id.* at S10412.

Although the Senate's final bill contained some oil spill prevention measures, Title IV originated in the House of Representatives in the Oil Pollution, Prevention, Response, Liability and Compensation Bill of 1989. In drafting that bill, the House generally chose to preempt, rather than to allow, state regulation. *See* Congressional Quarterly Almanac, 102d Cong., 2d Sess., p. 283 (1990) (noting the "House's insistence on a provision to pre-empt strict state laws"). Specifically, the House's preemption provision allowed states only to establish or maintain an oil spill fund and "to impose, or to determine the amount of, any fine or penalty." *See* Cong. Rec., 101st Cong., Vol. 135, part 20, 27827, 27947 (bound ed. Nov. 8, 1989).[9]

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[9] Section 1018 of the House version provided:

(a) PREEMPTION

(1) ACTIONS PREEMPTED.—Except as provided in this Act and the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), no action arising out of a discharge of oil, or a substantial threat of a discharge of oil, from a vessel or facility into or upon the navigable waters or adjoining shorelines or the exclusive economic zone (other than an action for personal injury or wrongful death), may be brought in any court of the United States or of any State or political subdivision thereof.

(2) STATE FUNDS AND ACCOUNTS.—Nothing in this Act or in sections 4611 and 9509 of the Internal Revenue Code of 1986 shall affect the authority of any State (A) to establish or continue in effect an oil spill fund or account; or (B) to require any person to contribute to that fund or account.

(b) NO PREEMPTION OF PENALTIES.—Nothing in this Act or section 9509 of the Internal Revenue Code of 1986 shall affect the authority of the United States or any State or

After vigorous debate, the House eventually amended its preemption provisions and adopted wording similar to that found in the Senate's § 106 preemption clauses.[10] *See* 135 Cong. Rec. H8165 (daily ed. Nov. 8, 1989). However, the debate made clear that the House intended for the preemption clauses to apply

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political subdivision thereof to impose, or to determine the amount of, any fine or penalty for any violation of law relating to an incident.

(c) LIMITATION OF LIABILITY ACT.—The Act of March 3, 1851, shall not apply to removal costs and damages that directly result from an incident involving the discharge or substantial threat of discharge of oil.

[10] The amended House version of § 1018 provides in part:

(a) PRESERVATION OF STATE AUTHORITIES.—

(1) Notwithstanding any other provision, nothing in this Act or the Act of March 3, 1851 shall—

(A) be construed or interpreted as preempting any state or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such state; or

(B) affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or state law, including common law.

(2) Nothing in this Act or in sections 4611 or 9509 of the Internal Revenue Code of 1986 shall affect or be construed to affect the authority of any state or political subdivision thereof—

(A) to establish or to continue in effect a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(B) to require any person to contribute to such a fund.

135 Cong. Rec. 156 H8128-29 (daily ed. Nov. 8, 1989).

only to OPA 90's oil spill *liability and compensation* provisions. *Compare id.* at H8129 (Nov. 8, 1989) (statement of Rep. Miller) ("The amendment that I am offering on behalf of myself and the gentleman from Massachusetts [Mr. Studds] is an amendment to correct a glaring flaw in H.R. 1465, by preserving the rights of States to set higher standards for *oil pollution liability and* more complete systems of *compensation* than are allowed under this bill or under current law.") (emphasis added) *with id.* (statement of Rep. Hammerschmidt) ("I had thought that the issue of concern centered around whether *State liability* laws should be preempted. That is not the only issue presented by this amendment. This amendment goes much further. It would remove provisions in the bill addressing the need for a uniform system of *financial responsibility*. The system of *liability and compensation* in the bill is intended to be comprehensive and definite.") (emphasis added).

In summary, before Congress held its Conference Committee, the Senate had a bill with: (a) a preemption clause in its oil pollution liability and compensation title (Title I, § 106); and (b) some oil spill prevention provisions in Title III, which had their own specific preemption provision (§ 310). The House, where most of Title IV originated, had only one preemption provision (§ 1018), which was similar to the Senate's § 106 and which the House intended to apply only to oil spill liability and compensation.

The Conference Committee deleted the Senate's § 310 preemption clause that applied to oil spill prevention measures. Moreover, the Conference Committee relied only on the Senate's § 106 and the House's

§ 1018 when drafting the final preemption clauses. *See* H.R. Conf. Rep. No. 101-653, pp. 121-22 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 799-800 ("Section 106 of the Senate amendment and section 1018 of the House bill are generally similar provisions. . . . The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the liability of Federal employees.").[11] The Conference Committee's deletion of the only preemption clause that applied specifically to oil spill prevention, and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of § 1018 to apply to OPA 90's oil spill prevention provisions (Title IV).

Under all the circumstances, Congress' choice of wording and its decision to place the preemption clauses in Title I suggest that it intended for those clauses to apply only to Title I and its liability and compensation provisions. *See, e.g., National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436, 1448 (E.D.Va.1996) ("The purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA."), *aff'd*, 122 F.3d 1062 (4th Cir. 1997) (Table), *cert. denied*, — U.S. ——, 118 S.

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[11] The Conference Committee also indicated its intent "not to disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978)." *Id.*

Ct. 1301, 140 L.Ed.2d 467 (1998). The opinion's method of analyzing Congress' intent is incomplete and, thus, the opinion's conclusion fails accurately to identify that intent.

PREEMPTIVE EFFECT OF COAST GUARD REGULATIONS

Relying on *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L.Ed.2d 369 (1986), the *Intertanko* opinion refuses to give preemptive effect to various Coast Guard regulations, because (1) Congress did not expressly delegate to the Coast Guard the power to preempt state law, and (2) OPA 90's pre-emption clauses implied the opposite Congressional intent. *See Intertanko*, 148 F.3d at 1068 ("*Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law.* Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements. In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so.") (citations and footnote omitted) (emphasis added). That analysis is inconsistent with Ninth Circuit and Supreme Court precedent.

Generally, an administrative agency's regulations have preemptive effect whenever Congress has authorized the agency to enact such regulations, not merely when Congress expressly has authorized the agency to preempt state law. *See City of New York v. FCC*, 486 U.S. 57, 64, 108 S. Ct. 1637, 100 L.Ed.2d 48 (1988) ("[A] pre-emptive regulation's force does not depend on express congressional authorization to displace state

law. Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.") (citation and internal quotation marks omitted); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982) (making the same point).

Louisiana Pub. Serv. Comm'n is not to the contrary. There, the Supreme Court refused to give preemptive effect to an administrative agency's regulations, because Congress had *expressly denied* the administrative agency the power to enact the regulations. *See* 47 U.S.C. § 152(b) ("[N]othing in this chapter shall be construed to apply to or give the Commission [FCC] jurisdiction with respect to . . . intrastate communication service."); *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360, 106 S. Ct. 1890 ("[T]he Act grants to the FCC the authority to regulate interstate and foreign commerce in wire and radio communication, while expressly denying that agency jurisdiction with respect to . . . intrastate communication service.") (citation and internal quotation marks omitted).

By contrast, OPA 90 did not deny the Coast Guard power to enact the regulations at issue here. Rather, Congress "*required* the Coast Guard to implement a wide range of oil-spill prevention rules" when it passed OPA 90. *Intertanko*, 148 F.3d at 1068 (emphasis added). *See* 33 U.S.C. §§ 2701-18 (so providing). Because the Coast Guard acted within its authority when it enacted the regulations, those regulations can have

preemptive effect, even though Congress did not expressly authorize the Coast Guard to preempt state law.

OPA 90's preemption clauses, allowing for some state involvement, do not alter that analysis. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), this court similarly faced a Congressional statute that allowed state involvement. *Id.* at 489 ("The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore."). Even though Congress had allowed state involvement, this court still analyzed whether the Coast Guard's regulations preempted state law. *See id.* at 499 ("Although we conclude that the objectives of the Alaska statute do not conflict with those of the Coast Guard regulations . . ., we must nevertheless determine whether the facts of this case as alleged or conceded by appellees reveal an irreconcilable conflict when the Alaska statute and Coast Guard regulations are applied concurrently in Alaska territorial waters."). *Accord Beveridge v. Lewis*, 939 F.2d 859, 864 (9th Cir. 1991). In summary, the opinion's treatment of the regulations is inconsistent with precedent.

CONCLUSION

For the foregoing reasons, I dissent from the court's decision to decline the suggestion for a rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C95-1096C

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PLAINTIFF

v.

MIKE LOWRY, ET AL., DEFENDANTS

[Nov. 18, 1996]

ORDER

COUGHENOUR, District Judge.

This matter comes before the Court on cross-motions for summary judgment filed by plaintiff, defendants and intervenors. Having heard oral argument, and having reviewed the pleadings, memoranda, exhibits and other documents on file, the Court now finds and concludes as follows:

I. Background

This is a lawsuit brought by the International Association of Independent Tanker Owners ("Intertanko") against Washington State, certain state officials, and four county prosecutors. Intertanko seeks an order

declaring that certain Washington statutes and regulations pertaining to the operation of oil tankers in state waters are unconstitutional. Three environmental groups, the National Resources Defense Council, the Washington Environmental Counsel and Ocean Advocates, Inc., have intervened.

The marine waters of Washington include a rocky ocean coastline, the "inland sea" of Puget Sound, and the Strait of Juan de Fuca. These waters host ecosystems that are as rich and diverse as any in the world. These waters are also highly susceptible to damage from oil pollution. Puget Sound is particularly vulnerable because it is relatively confined and shallow. Puget Sound is also difficult to navigate due to vessel traffic, fog and natural obstructions.

Intertanko is a trade association with approximately 253 members and 152 associate members who own or operate tankers. Intertanko's members represent on a tonnage basis, approximately 80 percent of the world's independently owned tanker fleet. Intertanko members call at oil facilities in Puget Sound, and travel along the Columbia River to reach ports in Oregon.

Intertanko challenges several statutes and regulations that have been implemented by the state to prevent oil spills and thereby protect Washington waters. *See* RCW 88.46.010, *et seq.*, and WAC 317-21-010, *et seq.* Intertanko specifically asserts that RCW 88.46.010(2)-(3), and RCW 88.46.040(3) are preempted or otherwise invalidated by federal law. In order to transport oil in state waters, these statutes require tank vessel operators to file oil spill prevention plans. These plans must provide for the best achievable protection from damages caused by the discharge of oil,

and must comply with regulations adopted by the State Office of Marine Safety ("OMS").

Intertanko also asserts that 16 regulations promulgated by the OMS are invalid. These regulations lay out specific requirements that tanker vessel operators must satisfy to meet the best achievable protection standards in their prevention plans. These regulations may be summarized as follows:

1. Event Reporting—WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.

2. Operating Procedures—Watch Practices—WAC 317-21-130. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.

3. Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.

4. Operating Procedures—Engineering—WAC 317-21-210. Requires tankers in state waters to

follow specified engineering and monitoring practices.

5. Operating Procedures—Prearrival Tests and Inspections—WAC 317-21- 215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

6. Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

7. Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

8. Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

9. Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317-21-235. Requires drug and alcohol testing and reporting.

10. Personnel Policies—Personnel Evaluation—WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires

operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.

11. Personnel Policies—Work Hours—WAC 317-21-245. Sets limitations on the number of hours crew members may work.

12. Personnel Policies—Language—WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

13. Personnel Policies—Record Keeping—WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

14. Management—WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development and fitness, and technological improvements in navigation.

15. Technology—WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports—WAC 317-21-540. Requires at least twenty-

four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

Intertanko relies on a number of federal statutes, regulations and international treaty obligations to assert that the state statutes and regulations improperly intrude into a field controlled by the federal government. Most of the federal law relied on by Intertanko is derived from the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972 ("PWSA"), the Port and Tanker Safety Act of 1978 ("PTSA")[1], and the Oil Pollution Act of 1990 ("OPA 90")[2]. The progressive passage of these acts by Congress either added to or amended prior law regarding the regulation of oil tankers. The provisions of these acts are largely found in Titles 33 and 46 of the United States Code. These laws impose specific requirements for tankers or delegate to the Coast Guard the responsibility for promulgating specific standards.

Intertanko also relies on a handful of treaties to which the United States has acceded. These include the International Convention for the Safety of Life at Sea, 1974 ("SOLAS"), the International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of 1978 ("MARPOL"), the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"), and the International Regulation for Preventing Collisions at

[1] These two acts are often referred to together as the "PWSA/PTSA."

[2] Pub. L. No. 101-380, 104 Stat. 486 (August 18, 1990).

Sea, 1973 ("COLREGS"). These treaties have all been signed and ratified by the United States.[3]

II. Discussion

This case tests the extent to which Washington State may protect its marine environment by regulating oil tankers in the areas of operations, personnel, management, technology and information reporting. Although protection of the marine environment has historically been within the reach of the police powers of the states, shipping has traditionally been governed by federal law. Thus the Washington oil spill prevention statutes and regulations overlap requirements imposed by the federal government. This overlap creates a tension between the power of the state and the power of the federal government.

Intertanko seeks to resolve this tension. Intertanko argues that the Washington oil spill prevention statutes

[3] A treaty cannot, however, have any impact on domestic laws unless it is self-executing, or unless its terms are enacted as parts of statutes or administrative regulations. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985). There are at least four relevant factors to be considered when determining whether a treaty is self-executing: "(1) 'the purposes of the treaty and the objectives of its creators,' (2) 'the existence of domestic procedures and institutions appropriate for direct implementation,' (3) 'the availability and feasibility of alternative enforcement methods,' and (4) 'the immediate and long range social consequences of self- or non-self-execution.'" *Id.* (quoting *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1445, 43 L.Ed.2d 761 (1975)). Intertanko has not addressed these four factors in asserting that the treaties it relies upon are self-executing. Intertanko has, however, identified where these treaties have been implemented by federal statute and regulation.

and regulations are preempted by federal statutes and regulations, and by federal treaty obligations through the Supremacy Clause of the United States Constitution. It also argues that the oil prevention statutes and regulations violate the Foreign Affairs Clause of the Constitution and the Commerce Clause of the Constitution. In addition, it asserts that the regulations are invalid because they reach beyond the three mile territorial limit of the navigable waters of Washington State.

Intertanko moves for summary judgment and asks the Court to enjoin the enforcement of the oil spill prevention laws. Defendants and intervenors move for summary judgment dismissing Intertanko's complaint. Because the resolution of this case depends almost exclusively on questions of law, there are no genuine issues of material fact and Intertanko's claims may be fully litigated on summary judgment. Fed. R. Civ. P. 56.

A. Preemption

"[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L.Ed.2d 179 (1978). Explicit preemption is present when Congress so declares. *Id.* Implicit preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action. *Id.* It may also be inferred when "the federal interest is so dominant that the federal system will be assumed to

preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

In those cases where Congress has not totally foreclosed state regulation, a state statute is preempted if it conflicts with a federal statute. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994. "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1941)).

Express and implied preemption do not require that state and federal rules conflict. A state rule may be preempted under these theories when it is different than the federal rule. The state and federal rule must, however, be at odds for conflict preemption to apply.

1. Oil Pollution Act of 1990

As an initial matter, defendants and intervenors assert that OPA 90 expressly prohibits the preemption of state oil spill prevention laws. Congress passed OPA 90 soon after the Exxon Valdez oil spill in Prince William Sound. The Act addresses oil pollution liability, compensation, prevention and removal.

Defendants and intervenors rely on OPA 90 § 1018, which is codified at 33 U.S.C. § 2718. Section 1018 of the Act states in relevant part:

(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT—Nothing in this Act . . . shall—

> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge;
>
> * * * * * *

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES, PENALTIES—Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Defendants and intervenors claim that this language recognizes the right of states to impose additional requirements to prevent oil spills. The starting point

for statutory interpretation is consideration of the language employed by Congress, and consideration of the statute as a whole, including its history and purposes. *United States v. van den Berg*, 5 F.3d 439, 442 (9th Cir. 1993).

The language of section 1018 is best understood when the Act as a whole is considered. Section 1018 of OPA 90 is located in "Title I—Oil Pollution Liability and Compensation." Title I of OPA 90 sets the standards for liability and damages for the discharge of oil or the substantial threat of discharge of oil into the navigable waters of the United States. The Act also includes "Title IV—Prevention and Removal." This title sets standards for tanker personnel qualifications, manning, operations, design and construction. It also directs the President to prepare a National Contingency Plan for the removal of oil, and to require tank vessel operators to prepare individual response plans for the removal of oil.

The language of the savings clause relied on by defendants and intervenors applies broadly to "this Act," which includes oil pollution liability, compensation, prevention and removal requirements. It makes clear that states are not preempted from adding additional "requirements with respect to . . . the discharge of oil," or "relating to the discharge . . . of oil." Because the Act comprehensively addresses oil discharge liability, compensation, prevention and removal, all provisions of the Act must be "with respect to" or "relating to" the discharge of oil. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483, 112 L.Ed.2d 474 (1990) (a law relates to a subject when it has a connection with or reference to

that subject). Pursuant to the broad language of section 1018, it follows that none of the provisions of OPA 90 preempt the ability of the states to add to federal requirements in the areas addressed by the Act.

Intertanko's assertion that the savings clause is limited to liability, compensation, and removal, but not prevention, is not supported by the broad language employed in section 1018. Moreover, Intertanko's assertion that the nonpreemption language is limited in its application by its placement in Title I is refuted by the explicit allowance in section 1018 for additional state regulation of "removal activities." Removal activities are regulated not in Title I, but in Title IV along with prevention standards. Thus the savings clause cannot be limited to Title I, but must also include Title IV.

In addition, Intertanko's assertion that applying the savings clause to the prevention requirements would run afoul of international standards is undermined by other provisions in the Act. Foremost is the requirement that oil tankers have double hulls. 46 U.S.C. § 3703a. This contradicts the international standards imposed by Regulation 13F to Annex I of MARPOL, and demonstrates that Congress was not overly concerned with maintaining uniformity with such standards. In addition, the Act clearly states that it is in the best interests of the United States to participate in an international regime "that is at least as effective as Federal and State laws in preventing incidents . . ." OPA 90 § 3001.[4] This anticipates that federal and state

[4] Although this statement relates only to liability and removal regimes, it supports the view that Congress did not intend the provisions of OPA 90 to be limited by international standards.

laws may be more effective than international standards.

The application of the savings clause to prevention regulations is also supported by the legislative history of OPA 90. The Conference Report on the final version of OPA 90 explains the preemptory effect of the Act:

> Thus, subsection (a) of section 1018 of the substitute states explicitly that nothing in the substitute [bill] . . . shall affect in any way *the authority of the State or local government to impose additional liability or other requirements with respect to oil pollution* or to the discharge of oil within the State or with respect to any removal activities in connection with such discharge.

H.R. Conf. Rep. No. 101-653, 101st Cong., 1st Sess., p. 121 (1990), *reprinted in* 1990 U.S.C.C.A.N. 800 (emphasis added). This language reemphasizes that the Act broadly saves to states the ability to impose additional "requirements with respect to oil pollution."[5]

The impact of the savings clause on prevention standards is further highlighted by a letter to the Coast

[5] The Conference Report also stated that OPA 90 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151, [98 S. Ct. 988, 55 L.Ed.2d 179] (1978)." The citation to *Ray* may mean that there was an intention not to eradicate the Court's holding that federal law impliedly preempted state tanker design and construction regulations. *Ray*, 435 U.S. at 163-64, 98 S. Ct. at 997-98. That would not create an issue in this case because none of the Washington regulations control design and construction. Moreover, if there is a conflict between a statute and legislative history, the statute prevails. *In re the Matter of Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989).

Guard Commandant from the Washington State Congressional Delegation dated September 28, 1993. That letter concerned the application of Washington's regulations to vessels passing through state waters to reach Canada. The delegation said "[w]e are extremely concerned with the Coast Guard's threats to void state oil prevention standards for these Canada-bound vessels. In the Oil Pollution Act of 1990 Congress provided that state laws, requirements and jurisdiction would not be preempted by federal law. The U.S. Coast Guard should not be obstructing the state's efforts to protect state waters."

The only other court to address the nonpreemption language of OPA 90 also concluded that the Act saved to states the ability to impose additional requirements with regard to all aspects of oil pollution liability, compensation, prevention and removal. In *Berman Enterprises, Inc. v. Jorling*, 793 F.Supp. 408, 414-16 (E.D.N.Y. 1992), aff'd, 3 F.3d 602 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1073, 114 S. Ct. 883, 127 L.Ed.2d 78 (1994), the court examined a New York statute that required vessels to obtain a state license that among other things necessitated a showing that the vessel "'can provide necessary equipment to prevent, contain and remove discharges of petroleum.'" *Id.* at 411 (citing New York Navigation Law § 174(3)). The Court concluded that the OPA 90 savings clause made clear that the New York statute was not preempted. It concluded that the statute was actually an acceptance of "the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id.* at 416.

In similar fashion, upon a review of the language, structure and legislative history of the Act, the Court concludes that OPA 90's express nonpreemption language applies to the Washington State regulations, which govern tanker operations, personnel, management, technology and information reporting. These regulations cover much of the same ground addressed by the prevention provisions of OPA 90, which set standards for tanker personnel qualifications, manning, operations, design and construction. The Act made clear that Congress places a high priority on reducing the threat of oil pollution, and that states may impose additional requirements to meet these goals.

2. <u>Implied Field Preemption</u>.

Intertanko's assertion that a majority of the challenged regulations are invalid under the theory of implied field preemption is largely foreclosed by the nonpreemption language of OPA 90. Implied field preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action, or if the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Ray*, 435 U.S. at 157, 98 S. Ct. at 994.

Intertanko primarily asserts that the comprehensive regulation of oil tankers by the Federal government leaves no room for state regulation, which is thus preempted. There can be no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations. Comprehensive

regulation of an area alone, however, is not enough to infer preemption. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716-18, 105 S.Ct. 2371, 2376-78, 85 L.Ed.2d 714 (1985). There must be some additional showing that Congress intended the comprehensive nature of the regulation to foreclose state action.

In *Ray* the Supreme Court held that Congress impliedly occupied the field in the area of tanker design and construction. Among other things, the Court examined a Washington statute that required all oil tankers entering state waters to have certain standard safety features, including a minimum amount of horsepower, twin screws, and double hulls. *Ray*, 435 U.S. at 160, 98 S. Ct. at 995-96. The Court found that these state law requirements were impliedly preempted under the regime imposed by Title II of the PWSA.[6] It specifically examined 46 U.S.C. § 391a (1970 Ed., Supp. V), the provisions of which are now largely codified at 46 U.S.C. § 3703. With language similar to the current statute, the former version of section 3703 required the Coast Guard to issue regulations regarding the "design, construction, and operation" of tankers in order to protect "life, property, and the marine environment from harm." *Ray*, 435 U.S. at 161, 98 S. Ct. at 996.

Based on this statutory scheme the Court concluded that "Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the

[6] Title I is now codified as amended in 33 U.S.C. §§ 1221-1232, and Title II is now codified as amended at 46 U.S.C. §§ 3701-3718.

United States." *Id.* at 163, 98 S. Ct. at 997. As a result, "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." *Id.* at 163-64, 98 S. Ct. at 997.

The Court also noted that states have more latitude outside the area of tanker design and construction. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69, 98 S. Ct. at 1000.

In this regard, the *Ray* Court addressed the impact of Title I of the PWSA on a Washington State regulation that required tug escorts for tankers over 40,000 DWT when certain design requirements were not met. The Court noted that Title I of the PWSA provided that the Coast Guard "may" promulgate vessel operating requirements, which could impose certain vessel traffic services and systems, could require equipment necessary to follow these services and systems, could control vessel traffic by among other things specifying size and speed limitations, and could restrict vessel operations to those having the particular operating characteristics that are necessary for safety. *Id.* at 169-70, 98 S. Ct. at 1000. This authorization for Coast Guard action was codified at 33 U.S.C. § 1221 (1970 ed., Supp. V), and is currently located in large part at 33 U.S.C. § 1223.

The Court concluded that a tug escort provision was not a design requirement that would be subject to implied field preemption, but was instead an operating

rule "arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171, 98 S. Ct. at 1001. Because with regard to operating rules, the PWSA authorized but did not require the Coast Guard to issue controlling regulations, the Court found no implied field preemption. *Id.* It also concluded that because the Coast Guard had not promulgated tug escort provisions for Puget Sound, there was no conflict between the state rule and federal law. *Id.* at 172, 98 S. Ct. at 1001-02.[7]

The Ninth Circuit has also examined the preemptive effect of federal shipping regulations. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140, 105 S. Ct. 2686, 86 L.Ed.2d 703 (1985), the court examined an Alaska statute that prohibited oil tankers from discharging ballast water that had been stored in oil tanker holds. Instead, the state statute required tankers to discharge such ballast water into on-shore processing facilities. Chevron claimed that the statute was preempted by title II of the PWSA/PTSA, which required the Coast Guard to issue regulations concerning deballasting. That authority exists today under 46 U.S.C. § 3703(a)(7).[8]

[7] The *Ray* Court also made clear that certain environmental laws were not preempted by federal shipping laws and regulations. It explained that states can still require federally certified vessels to conform to "'reasonable, nondiscriminatory conservation and environmental protection measures'" *Id.* (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277, 97 S. Ct. 1740, 1748, 52 L.Ed.2d 304 (1977)); *see also Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590, 1601, 36 L.Ed.2d 280 (1973) ("sea-to-shore pollution [has been] historically within the reach of the police power of the States").

[8] It should be noted that section 3703(a)(7) is the successor to the statute that required the Coast Guard to promulgate regulations for the design and construction of tankers in *Ray*, which requirements were found to preempt Washington law. Thus a regulation mandated by 46 U.S.C. § 3703 does not automatically preempt state law.

The Coast Guard regulations concerning deballasting were less stringent than the Alaska statute.

The Ninth Circuit held that the federal statute and regulatory scheme did not impliedly preempt the state regulation concerning deballasting. *Id.* at 495. In reaching this decision, the court distinguished between the federal regulation of vessel "design characteristics," which were found to preempt state law in *Ray*, and the federal regulation of "pollutant discharges." *Hammond*, 726 F.2d at 488. It noted that the Supreme Court in *Ray* concluded that "'ship design and construction standards are matters for national attention,'" but that "[t]he subject matter of environmental regulation, on the other hand, has long been regarded by the Court as particularly suited to local regulation." *Id.* (quoting *Ray*, 435 U.S. at 166 n.15, 98 S. Ct. at 998 n.15). The Ninth Circuit classified the Alaska statute concerning the disposal of ballast water as an environmental regulation limiting the discharge of pollutants from tankers. *Id.* It concluded that while the statute was not subject to implied field preemption, it could be, but was not, subject to conflict preemption. *Id.* at 495, 501.

The Ninth Circuit also addressed the degree to which federal shipping regulations preempted state law in *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991). At issue there was a municipal ordinance regulating moorage and anchorage in Santa Barbara Harbor. The court concluded that while the Coast Guard had

extensive authority to regulate the anchoring, mooring and movement of vessels under 33 U.S.C. § 1223, that was not enough to create implied preemption. It explained:

> Just as *Ray* refused to find implicit preemption and proceeded to discuss the *actual* conflicts between Washington's Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring. We cannot distinguish tanker (*Ray*) and pollution (*Chevron*) regulations from mooring restrictions. If both the Supreme Court and this circuit did not find Congress to have intended to preempt all local regulation by the PWSA in those areas, it is difficult to conceive how it could be found here.

Id. at 863. Moreover, the Court recognized that there is "congressional intent that 'there be joint federal/state regulation of ocean waters within three miles of shore.'" *Id.* at 864 (quoting *Chevron*, 726 F.2d at 489). The Court went on to find that there was no actual conflict between the municipal ordinance and federal law. *Id.* at 864-65.

From *Ray* and its progeny two levels of preemption for statutes and regulations like those at issue here may be distilled. These categories depend on the subject matter that is being regulated. State regulation of oil tanker design and construction is impliedly preempted by federal law. *Ray*, 435 U.S. at 163-64, 98 S. Ct. at 997-98. State regulation of tanker operations "arising from the peculiarities of local waters that call for special precautionary measures" is not subject to implied field preemption, but may not actually conflict with federal regulation. *Ray*, 435 U.S. at 171, 98 S. Ct. at 1001.

State regulation of water pollution is also not subject to implied field preemption, but may not actually conflict with federal regulation. *Chevron*, 726 F.2d at 495.

Here, the Washington regulations govern vessel operations in order "to protect the state's natural resources and waters . . ." RCW 88.46.010. To do so standards are imposed in the areas of tanker operations, personnel, management, technology and information reporting. These areas are much more akin to the operational tug escort provisions upheld in *Ray*, than to the design and construction requirements that were struck down in that case.[9] The state regulations arise "from the peculiarities of local waters that call for special precautionary measures." *Ray*, 435 U.S. at 171, 98 S. Ct. at 1001.

Moreover, these standards are intended to protect the environment, and thus are an exercise of the state's police powers. When vessels are involved, however, there is an unavoidable overlap between state and federal regulation. But when the concern is pollution,

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[9] A portion of the state statute struck down in *Ray* did include radar and navigational position locating systems. *Ray*, 435 U.S. at 160, 98 S. Ct. at 995-96. Such requirements are more aptly included as regulations under Title I of the PWSA/PTSA, 33 U.S.C. § 1223, which provides that the Coast Guard may establish vessel traffic services in navigable waters of the United States, and in doing so "may require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device . . ." Thus the requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223. These requirements are not subject to implied preemption.

the Ninth Circuit has recognized the need for "joint federal/state regulation of ocean waters within three miles of shore." *Chevron*, 726 F.2d at 489. This partnership was further verified by the nonpreemption clause of OPA 90. As such, the Court cannot conclude that the Washington oil spill prevention statutes and regulations are impliedly preempted.[10]

3. Express Preemption.

Intertanko hinges its claim of express preemption on several federal regulations issued by the Coast Guard, in which it is stated that the regulation is intended to preempt state law. As a general rule, "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73

[10] Intertanko also argues that implied field preemption is necessitated because of the strength of the federal interest in maritime law uniformity. *See Rice*, 331 U.S. at 230, 67 S. Ct. at 1152. This argument is not sufficient on its own to justify a finding of implied field preemption. The Ninth Circuit has explained that "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990) (emphasis in original), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992). This statement recognizes that the federal interest in maritime law does not always preempt state law. Moreover, the touchstone for preemption is conflict with federal law or interference with uniformity. These tests lead back to the question of whether the federal regulation is sufficiently comprehensive in the field to prohibit conflict and to require uniformity. Moreover, any question about whether the need for uniformity creates implied preemption is foreclosed by OPA 90.

L.Ed.2d 664 (1982). Where Congress has directed an agency to exercise its discretion in regulating a field, the agency may issue regulations that preempt state law. *Id.* at 154, 102 S. Ct. at 3023. Such regulations may be effective so long as the agency has not exceeded the scope of its delegated authority, and has not acted in a manner that conflicts with the intent of Congress with regard to preemption as stated in the derivative statute or its legislative history. *Id.*

Intertanko alleges that one of the Washington oil spill prevention statutes, and five of the oil spill prevention regulations or subparts are expressly preempted by regulations issued by the Coast Guard.

In this instance, however, Congress did not intend to give the Coast Guard authority to preempt state law with regard to the prevention of oil spills. The nonpreemption language of OPA 90 § 1018 prohibits the Coast Guard from doing so. *See Fidelity Federal*, 458 U.S. at 154, 102 S. Ct. at 3023.

In the one regulatory statement where the Coast Guard attempted to reconcile OPA 90 and *Ray*, it misconstrued the law and overstated its authority to preempt. Intertanko argues that 33 C.F.R. § 155.225, which requires oil tankers to have certain emergency towing capabilities, expressly preempts WAC 317-21-265(2), which requires tankers to be equipped with an emergency towing system. When it promulgated the federal rule, the Coast Guard stated that:

This rule establishes regulations requiring certain vessels to carry discharge removal equipment. In [*Ray*], the Supreme Court found that vessel design and equipment standards fall within the exclusive province

of the Federal Government. The OPA 90 Conference Report explicitly says that provisions in section 1018 of OPA 90 preserving certain State authority are not meant to disturb this Supreme Court decision. Therefore, the Coast Guard intends this rule to preempt State action addressing the same subject matter.

Discharge Removal Equipment for Vessels Carrying Oil, 58 Fed. Reg. 67,995 (1993) (citation omitted). Because *Ray* required implied preemption only in the areas of tanker design and construction, and not with regard to equipment standards, the Coast Guard statement is inaccurate. Moreover, because a tow package is considered an item of discharge removal equipment, it is directly saved by the language of OPA 90 allowing states to impose additional requirements with respect to "any removal activities." OPA 90 § 1018(a)(1)(B). The Coast Guard was without authority to preempt state law with this regulation, or with the other regulations cited by Intertanko.

4. **Conflict Preemption.**

Intertanko also argues that some of the Washington regulations are in direct conflict with federal rules, and as such are preempted. Intertanko does not, however, identify any conflicts that require preemption. A state law is in conflict with and preempted by federal law (1) if compliance with both state and federal law is a physical impossibility or (2) if the state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994.

Intertanko identifies eight Washington regulations that parallel new requirements that are to be imposed

on February 1, 1997 pursuant to the 1995 amendments to the STCW. The new STCW requirements are being implemented by the Coast Guard through federal regulations. Intertanko asserts that there is a direct conflict because the state is requiring immediate implementation of these rules through its oil spill prevention regulations, rather than waiting until February 1, 1997. The state provisions cited by Intertanko require certain watch practices, navigation practices, training requirements for crew members, personnel evaluations, limitations on working hours, English language requirements, and management practices for the oversight of tankers. *See* WAC 317-21-200, 205(1)-(3), 230, 235, 240, 245 and 260.

First, to the extent that the Washington regulations require earlier implementation of the new STCW standards, compliance with state and federal law will not be a physical impossibility. *Ray*, 435 U.S. at 158, 98 S. Ct. at 994. Rather, early implementation will actually help operators be in compliance with the new STCW requirements when they become effective on February 1, 1997. Second, given the Congressional statement in OPA 90 as to the lack of preemption for additional, state imposed prevention requirements, the state regulations will not stand as an obstacle to the accomplishment and execution of the full purpose and objective of the new standards. *Id.* Indeed, the state regulations complement the federal goal of reducing "human error as a major cause of maritime casualties." Implementation of the 1995 Amendments to the STCW, 61 Fed. Reg. 13284 (March 26, 1996).[11]

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[11] Intertanko raises a similar complaint with regard to WAC 317-21-260(2), which requires vessel operators to have a manage-

Intertanko's emphasis on uniformity with international standards is also undercut by the Coast Guard's proposed rulemaking to implement the STCW. The Coast Guard explains that while it has tried to avoid "unnecessary additional requirements when international standards are being implemented. . . . In some cases, clear differences with the international scheme are retained to preserve continuity in the U.S. licensing system." 61 Fed. Reg. at 13285.

The same analysis holds true for the two federal regulations for which Intertanko alleges an actual conflict with state rules. Intertanko says that WAC 317-21-250, which requires that all masters and licensed deck officers be able to speak English, and be able to speak a language understood by subordinate officers and unlicensed crew, conflicts with 46 U.S.C. § 8702(b), which requires that 75 percent of the crew in each department on board be able to understand any order spoken by the officers. If, however, a vessel is in compliance with the state regulation, it will necessarily be meeting the less stringent requirements of federal law. Thus dual compliance is not impossible.

Intertanko also asserts that WAC 317-21-200(1), which requires that the navigation watch include two or three licensed deck officers, one of whom "may be a

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ment program, which meets the requirements of at least one of four international ship management regimes. One of these is the International Maritime Organization's International Safety Management Code ("ISM"). This code is to become mandatory for vessels operating in international trade on July 1, 1998. Intertanko alleges that the Washington regulations conflict because they require compliance prior to that date. Even if early compliance created an actual conflict, no such conflict would exist because the ISM is just one of four regimes tanker operators can follow.

state-licensed" pilot, conflicts with 46 U.S.C. § 8502, which permits the use of federal pilots on United States tankers participating in coastwide trades. There is no conflict in this instance because the Washington regulation does not require a state-licensed pilot to be used as a lookout.[12]

B. Commerce Clause.

Intertanko argues that the Washington oil spill prevention statutes and regulations unconstitutionally limit commerce. Two types of state regulations may violate the Commerce Clause: "(1) those that directly burden interstate commerce or that discriminate against out-of-state interests and (2) those that burden interstate transactions only incidentally." *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 395 (9th Cir.), *cert. denied*, 515 U.S. 1143, 115 S. Ct. 2580, 132 L.Ed.2d 830 (1995). Regulations in the first category are usually invalid unless the state can show that a legitimate local interest unrelated to economic protection is served and no less discriminatory alternative exists. *Id.* Those in the second category may be invalid if the challenging party can demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert. denied*, 513 U.S. 918, 115 S. Ct. 297, 130 L.Ed.2d 211 (1994).

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[12] As with the early implementation of the STCW standards, neither WAC 317-21-250 or 317-21-200(1) will prevent achievement of federal goals.

Intertanko alleges that the Washington oil spill prevention regime directly regulates commerce because tanker traffic by definition involves the interstate or international transportation of oil. The Ninth Circuit has explained, however, that a state law does not directly regulate interstate commerce merely because it concretely affects a business engaged in interstate commerce. *Kleenwell*, 48 F.3d at 396. If that were the case, any regulation that affected interstate commerce would be forbidden. *Id.* Rather, the term is used "to refer to regulations whose *central* purpose is to regulate commerce, usually in order to benefit local interests." *Id.* (emphasis in original). The Commerce Clause does not "invalidate state regulations whose primary purpose is to address a legitimate local concern and whose incidental effect is to regulate interstate commerce." *Id.*

The Washington oil spill prevention rules are not impermissibly aimed at regulating commerce, or otherwise impeding interstate trade to protect state business interests. The statutes and regulations are instead intended to protect local waters from pollution.

The statutes and regulations at issue are similar to the law upheld in *Kleenwell*. There, the state required waste haulers to obtain a certificate of public convenience and necessity in order to transport and dispose of waste. *Id.* at 393. A waste hauler challenged the certificate requirement as a direct burden on its interstate hauling of waste. *Id.* at 395-96. The court concluded that the purpose of the statute was not the regulation of commerce, but was instead the legitimate local concern of ensuring the safe disposal of solid waste. *Id.* at 398. It noted that Congress by statute

had "explicitly found that the field of solid waste collection is properly subject to state regulation." *Id.* Thus the Court found no direct regulation of commerce. *Id.*

In the present case oil tanker operators must file and obtain approval of an oil spill prevention plan in order to operate in state waters. RCW 88.46.040. The purpose of the requirement is to protect state waters and the marine environment, reduce the risk of a vessel casualty causing an oil spill, and to encourage procedures and technology that increase the safety of marine transportation and that protect the state's natural resources. WAC 317-21-010. To accomplish these goals the state requires operators to demonstrate through prevention plans that their oil tankers meet certain standards in the areas of tanker operations, personnel, management, technology and information reporting. In addition, Congress through the passage of OPA 90 § 1018 made clear that the states could regulate these areas in order to prevent oil spills. As in *Kleenwell*, the Washington oil spill prevention statutes and regulations do not directly regulate commerce in violation of the Commerce Clause.

There may still, however, be a Commerce Clause violation if "the incidental burdens on interstate and foreign commerce imposed by the Washington rules are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers*, 20 F.3d at 1012. Intertanko must show that the burdens that the regulations impose on interstate commerce "clearly outweigh" the local benefits. *Kleenwell*, 48 F.3d at 399.

Intertanko has not submitted sufficient evidence to make this showing.[13] It asserts that the cost to date for a single tanker operator to develop, file and maintain an oil spill prevention plan has been about $12,000 and that the cost of installing the emergency towing package required by the rules will be about $80,000. These are relatively small amounts compared to the average operating cost of a tanker, which is between $13.6 and $19 million for U.S. flag tankers, and between $8.4 and $12 million for non-U.S. flag tankers.

The costs of implementing a plan are also quite small when compared to the cost of an oil spill. The state reports that the estimated average cost of clean-up for four major oil spills in Washington between 1984 and 1988 was $6.3 million, and that the estimated impact on natural resources for each spill ranged between $2.2 and $8.1 million.

Given the relatively minimal cost of compliance as compared to the cost of an oil spill, Intertanko cannot demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the benefit offered by the oil spill prevention statutes and regulations. This benefit is derived from the state's promulgation of what all agree to be more stringent and protective regulations. Moreover, because of the wide

[13] Intertanko also argues that because this matter concerns international commerce, the Court must give additional scrutiny to determine whether the regulations might impair uniformity where under federal law uniformity is essential. *See Pacific Northwest Venison Producers*, 20 F.3d at 1014. Intertanko's uniformity concern is, however, misplaced. Congress through OPA 90 § 1018 has clarified that additional state oil spill prevention regulations are appropriate.

disparity in costs associated with prevention as compared to the impact of an oil spill, only a slight amount of additional protection need be achieved for the statutory scheme to have succeeded. As a result, Intertanko has not presented sufficient facts to prove an inequitable balance such that a Commerce Clause violation is present.[14]

C. **Foreign Affairs Clause**.

Intertanko also argues that the Washington oil spill prevention rules violate the Foreign Affairs Clause of the Constitution because they allow the state to contravene important international treaty agreements, and interfere with the federal government's ability to enter into such agreements. State regulations may not impair the effective exercise of the nation's foreign policy. *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S. Ct. 664, 670-71, 19 L.Ed.2d 683 (1968) (invalidating Oregon statutes that prevented foreign heirs from receiving property depending on the judgment of the state as to the propriety of the foreign country's domestic law). Thus "any state law that involves the state in the actual

[14] The Court recognizes that defendants and intervenors did not in their motions for summary judgment address the Commerce Clause claim. They did, however, argue in response to Intertanko's motion for summary judgment that the Commerce Clause claim could not be sustained. And in arguing the merits of the Commerce Clause claim, no party asserted the presence of genuine issues of material fact. As a result, the Court construes the arguments of defendants and intervenors to be akin to cross-motions for summary judgment. Moreover, settled precedent allows the entry of summary judgment to a non-moving party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1982). The Court reaches the same conclusion with regard to Intertanko's extraterritorial claim. *See infra*, at 1500-01.

conduct of foreign affairs is unconstitutional." *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *cert. denied*, 501 U.S. 1212, 111 S. Ct. 2814, 115 L.Ed.2d 986 (1991).

It is rare, however, that a state statute is invalidated because it intrudes into the area of foreign affairs. *Id.* ("[o]n only one occasion has the Supreme Court struck down a state statute as violative of the foreign relations power"). This is not such a case. Washington State is not acting in the federal government's place vis-a-vis a foreign or international body, but is instead exercising its police power by regulating both foreign and domestic tankers to protect the environment. Moreover, the state's decisions in this area are not keyed to any judgment as to the worthiness of a foreign regime. *See Trojan*, 916 F.2d at 903. Intertanko's Foreign Affairs Clause challenge cannot be sustained.

D. Extraterritorial Impact of Regulations.

Intertanko argues that the regulations impose obligations on tanker operators that go beyond the three-mile limit of Washington territorial waters, which is set by the Washington Constitution. Wash. Const. Art. XXIV, § 1 (setting state boundaries). It relies on *State ex rel. Luketa v. Pollock*, 136 Wash. 25, 29, 239 P. 8 (1925), which confirmed that "the jurisdiction and dominion of the state extends to the three-mile limit off shore as defined in the constitution . . ."

The Washington statutes and regulations at issue by definition regulate tanker operations in Washington waters. The legislature made it unlawful for a covered vessel to operate in Washington waters without an approved prevention plan. RCW 88.46.080, .090.

Owners and operators must submit prevention plans for their tank vessels. RCW 88.46.040(1). A Tank vessel, in turn, is defined as a ship that carries oil and that "[o]perates on the waters of the state." RCW 88.46.010. There is accordingly no direct assertion of jurisdiction over vessels outside of Washington waters.

Intertanko objects, however, to the incidental effects of the regulations. It objects to the requirements that owners report hazardous events even if the events occur outside of Washington, that owners use a bridge resource management system while in Washington waters that is the standard for the vessels in its fleet that operate in Washington[15], that certain crew training and drill programs be conducted, that certain personnel evaluation and record keeping requirements be administered, and that certain owner and operations management programs be followed. The Court agrees with the state, however, that while some of these activities are likely to occur outside of Washington, such occurrences are not mandated.

Moreover, the Supreme Court has upheld state police power regulations that incidentally and indirectly affect interstate or foreign commerce outside of state waters. *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426, 56 S. Ct. 513, 515, 80 L.Ed. 772 (1936) (denying

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[15] "The bridge resource management system must be standard practice throughout the owner's or operator's fleet." WAC 317-21-200(2). "'Fleet' means more than one tank vessel operated by the same owner or operator." WAC 317-21-060(5). "Tank vessel" means a ship that carries oil and that "[o]perates on the waters of the state." WAC 317-21-060(11). Thus application of the bridge resource management system to the "fleet" affects only those vessels that operate in Washington.

challenge to California law restricting the use of sardines caught outside of state waters). In addition, the Washington Supreme Court has upheld the authority of the state to prohibit the possession or transportation of salmon taken from beyond the state's three-mile limit. *Frach v. Schoettler*, 46 Wash.2d 281, 290, 280 P.2d 1038 *cert. denied*, 350 U.S. 838, 76 S. Ct. 75, 100 L.Ed. 747 (1955).[16] Although these cases deal with fisheries rather than the prevention of oil pollution, the principle remains the same. Some incidental impact on extraterritorial activities is permitted to protect state resources. Intertanko's extraterritorial challenge falls short.

III. Conclusion

The Court concludes that the Washington oil spill prevention statutes and regulations are constitutionally valid. These statutes and regulations are not preempted by federal law, do not violate the Commerce Clause or the Foreign Affairs Clause of the Constitution, and are not improper extraterritorial restrictions. Rather, the oil spill prevention laws legitimately protect Washington's delicate and valuable marine resources through the exercise of the state's police powers.

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[16] Intervenors point out that 16 U.S.C. § 1856(a)(3) now prohibits a state from "directly or indirectly regulat[ing] any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State." No similar proscription has been placed on the state's ability to prevent pollution. Rather, OPA 90 has made clear that states have authority to issue oil spill prevention regulations.

Therefore, the motions for summary judgment filed by defendants and intervenors are GRANTED and the motion for summary judgment filed by Intertanko is DENIED. This action is hereby DISMISSED and the Clerk of the Court is directed to enter judgment accordingly.[17]

SO ORDERED.

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[17] The issues raised in defendant Krider's motion for summary judgment were previously ruled on by the Court in the July 3, 1996 Order denying his motion to dismiss. Accordingly, his motion for summary judgment is DENIED. Plaintiff Intertanko's motion to supplement the summary judgment record is GRANTED.

APPENDIX D

Article VI, Clause 2, of the United States Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

1. Article VI of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) provides:

Certificates

(1) Certificates for masters, officers or ratings shall be issued to those candidate[s] who, to the satisfaction of the Administration, meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions of the annex to the Convention.

(2) Certificates for masters and officers issued in compliance with this article shall be endorsed by the issuing Administration in the form as prescribed in regulation I/2 of the annex. If the language used is not English, the endorsement shall include a translation into that language.

2. Article X of the STCW Convention provides:

Control

(1) Ships, except those excluded by article III, are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such certificates shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued.

(2) In the event that any deficiencies are found under paragraph (1) or under the procedures specified in regulation I/4, "Control procedures", the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. Such notification shall specify the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment.

(3) In exercising the control under paragraph (1), if, taking into account the size and type of the ship and the length and nature of the voyage, the deficiencies referred to in paragraph (3) of regulation I/4 are not corrected and it is determined that this fact poses a danger to persons, property or the environment, the Party carrying out the control shall take steps to ensure that the ship will not sail unless and until these requirements are met to the extent that the danger has been removed. The facts concerning the action taken shall be reported promptly to the Secretary-General.

(4) When exercising control under this article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.

(5) This article shall be applied as may be necessary to ensure that no more favorable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party.

3. Table A-II/1, Column 2, of the Seafarers' Training, Certification and Watchkeeping Code (STCW Code) provides, in relevant part:

<u>English language</u>

Adequate knowledge of the English language to enable the officer to use charts and other nautical publications, to understand meteorological information and messages concerning ship's safety and operation, to communicate with other ships and coast stations and to perform the officer's duties also with a multilingual crew, including the ability to use and understand the Standard Marine Navigational Vocabulary as replaced by the IMO Standard Marine Communication Phrases.

4. Section B-VIII/2, Part 5, of the STCW Code provides:

PART 5 - GUIDANCE ON PREVENTION OF DRUG AND ALCOHOL ABUSE*

34 Drug and alcohol abuse directly affect the fitness and ability of a seafarer to perform watchkeeping duties. Seafarers found to be under the influence of drugs or alcohol should not be permitted to perform watchkeeping duties until they are no longer impaired in their ability to perform those duties.

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* See MSC/Circ. 595 - Principles and Guidelines Concerning Drug and Alcohol Abuse Programmes and MSC/Circ. 634 - Drug Use and Alcohol Abuse.

35 Administrations should consider developing national legislation:

.1 prescribing a maximum of 0.08% blood alcohol level (BAC) during watchkeeping duty as a minimum safety standard on their ships; and

.2 prohibiting the consumption of alcohol within 4 hours prior to serving as a member of a watch.

Drug and alcohol abuse screening programme guidelines

36 The Administration should ensure that adequate measures are taken to prevent alcohol and drugs from impairing the ability of watchkeeping personnel, and should establish screening programmes as necessary which:

.1 identify drug and alcohol abuse;

.2 respect the dignity, privacy, confidentiality and fundamental legal rights of the individuals concerned; and

.3 take into account relevant international guidelines.*

* See MSC/Circ. 595 - Principles and Guidelines Concerning Drug and Alcohol Abuse Programmes and MSC/Circ. 634 - Drug Use and Alcohol Abuse.

5. Section A-VIII/1 of the STCW Code provides:

Fitness for duty

1 All persons who are assigned duty as officer in charge of watch or as a rating forming part of a watch shall be provided a minimum of 10 hours of rest in any 24-hour period.

2 The hours of rest may be divided into no more than two periods, one of which shall be at least 6 hours in length.

3 The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or in other overriding operational conditions.

4 Notwithstanding the provisions of paragraphs 1 and 2, the minimum period of ten hours may be reduced to not less than 6 consecutive hours provided that any such reduction shall not extend beyond two days and not less than 70 hours of rest are provided each seven-day period.

5 Administrations shall require that watch schedules be posted where they are easily accessible.

APPENDIX F

1. Section 3703 of Title 46, United States Code, provides:

§ 3703. Regulations

(a) The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. The Secretary may prescribe different regulations applicable to vessels engaged in the domestic trade, and also may prescribe regulations that exceed standards set internationally. Regulations prescribed by the Secretary under this subsection are in addition to regulations prescribed under other laws that may apply to any of those vessels. Regulations prescribed under this subsection shall include requirements about—

(1) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;

(2) the handling or stowage of cargo, the manner of handling or stowage of cargo, and the machinery and appliances used in the handling or stowage;

(3) equipment and appliances for lifesaving, fire protection, and prevention and mitigation of damage to the marine environment;

(4) the manning of vessels and the duties, qualifications, and training of the officers and crew;

(5) improvements in vessel maneuvering and stopping ability and other features that reduce the possibility of marine casualties;

(6) the reduction of cargo loss if a marine casualty occurs; and

(7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.

(b) In prescribing regulations under subsection (a) of this section, the Secretary shall consider the types and grades of cargo permitted to be on board a tank vessel.

(c) In prescribing regulations under subsection (a) of this section, the Secretary shall establish procedures for consulting with, and receiving and considering the views of—

(1) interested departments, agencies, and instrumentalities of the United States Government;

(2) officials of State and local governments;

(3) representatives of port and harbor authorities and associations;

(4) representatives of environmental groups; and

(5) other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment.

2. Section 1018(a) of the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 505 (codified at 33 U.S.C. 2718(a)) provides, in relevant part:

Nothing in this Act * * * shall * * * affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge.

3. Section 1018(c) of the OPA, 104 Stat. 506 (codified at 33 U.S.C. 2718(c)) provides, in relevant part:

Nothing in this Act * * * shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof— (1) to impose additional liability or additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

APPENDIX G

1. Section 95.035 of Title 33 of the Code of Federal Regulations provides:

§ 95.035 Reasonable cause for directing a chemical test.

(a) Only a law enforcement officer or a marine employer may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. Reasonable cause exists when:

(1) The individual was directly involved in the occurrence of a marine casualty as defined in Chapter 61 of Title 46, United States Code, or

(2) The individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.

(b) When an individual is directed to undergo a chemical test, the individual to be tested must be informed of that fact and directed to undergo a test as soon as is practicable.

(c) When practicable, a marine employer should base a determination of the existence of reasonable cause, under paragraph (a)(2) of this section, on observation by two persons.

2. Section 155.700 of Title 33 of the Code of Federal Regulations provides:

§ 155.700 Designation of person in charge.

Each operator or agent of a vessel with a capacity of 250 or more barrels of fuel oil, cargo oil, hazardous material, or liquefied gas as regulated in Table 4 of 46

CFR part 154, or each person who arranges for and hires a person to be in charge of a transfer of fuel oil, of a transfer of liquid cargo in bulk, or of cargo-tank cleaning, shall designate, either by name or by position in the crew, the person in charge (PIC) of each transfer to or from the vessel and of each tank-cleaning.

3. Section 164.13(c) of Title 33 of the Code of Federal Regulations provides:

§ 164.13 Navigation underway: tankers.

* * * * *

(c) Each tanker must navigate with at least two licensed deck officers on watch on the bridge, one of whom may be a pilot. In waters where a pilot is required, the second officer, must be an individual licensed and assigned to the vessel as master, mate, or officer in charge of a navigational watch, who is separate and distinct from the pilot.

4. Section 4.05-12 of Title 46 of the Code of Federal Regulations provides:

§ 4.05-12 Alcohol or drug use by individuals directly involved in casualties.

(a) For each marine casualty required to be reported by § 4.05-10, the marine employer shall determine whether there is any evidence of alcohol or drug use by individuals directly involved in the casualty.

(b) The marine employer shall include in the written report, Form CG-2692, submitted for the casualty information which:

(1) Identifies those individuals for whom evidence of drug or alcohol use, or evidence of intoxication, has been obtained; and,

(2) Specifies the method used to obtain such evidence, such as personal observation of the individual, or by chemical testing of the individual.

(c) An entry shall be made in the official log book, if carried, pertaining to those individuals for whom evidence of intoxication is obtained. The individual must be informed of this entry and the entry must be witnessed by a second person.

(d) If an individual directly involved in a casualty refuses to submit to, or cooperate in, the administration of a timely chemical test, when directed by a law enforcement officer or by the marine employer, this fact shall be noted in the official log book, if carried, and in the written report (Form CG-2692), and shall be admissible as evidence in any administrative proceeding.

5. Subpart 4.06 of Title 46 of the Code of Federal Regulations provides:

SUBPART 4.06—MANDATORY CHEMICAL TESTING FOLLOWING SERIOUS MARINE INCIDENTS INVOLVING VESSELS IN COMMERCIAL SERVICE

§ 4.06-1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the

occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.

(c) The determination of which individuals are directly involved in a serious marine incident is to be made by the marine employer. A law enforcement officer may determine that additional individuals are directly involved in the serious marine incident. In such cases, the marine employer shall take all practicable steps to have these individuals tested in accordance with paragraph (b) of this section.

(d) The requirements of this subpart shall not prevent vessel personnel who are required to be tested from performing duties in the aftermath of a serious marine incident when their performance is necessary for the preservation of life or property or the protection of the environment.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

(f) Each marine employer shall implement the testing requirements of this subpart in accordance with

the implementation schedule provided in 46 CFR 16.205 and 16.207.

§ 4.06-5 Responsibilities of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for chemical tests required by § 4.06-10 when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide blood, breath or urine specimens, this refusal shall be noted on Form CG-2692B and in the vessel's official log book, if one is required.

(c) No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations.

§ 4.06-10 Required specimens.

Each individual required to submit to chemical testing shall, as soon as practicable, provide the following specimens for chemical testing:

(a) Urine specimens, collected in accordance with § 4.06-20 and Part 16 of this Chapter.

(b) Blood or breath specimens, or both, collected in accordance with § 4.06- 20.

§ 4.06-20 Specimen collection requirements.

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times a breath testing device capable of determining the presence of alcohol in a person's system. The breath testing device shall be used in accordance with procedures specified by the manufacturer.

(b) The marine employer shall ensure that urine specimen collection and shipping kits meeting the requirements of § 16.330 of this part are readily available for use following serious marine incidents. The specimen collection and shipping kits need not be maintained aboard each vessel if they can otherwise be readily obtained within 24 hours from the time of the occurrence of the serious marine incident.

(c) The marine employer shall ensure that specimens required by § 4.06-10 are collected as soon as practicable following the occurrence of a serious marine incident.

(d) When obtaining blood, breath, and urine specimens, the marine employer shall ensure that the collection process is supervised by either qualified collection personnel, the marine employer, a law enforcement officer, or the marine employer's representative.

(e) Chemical tests of an individual's breath for the presence of alcohol using a breath testing device may be conducted by any individual trained to conduct such tests. Blood specimens shall be taken only by qualified medical personnel.

§ 4.06-30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

§ 4.06-40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06-20 and

4.06-30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.310 of this part and the chain of custody requirements of § 16.320 are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06-20 and 4. 06-30 are promptly shipped to a laboratory complying with the requirements of 49 CFR Part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

§ 4.06-50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 49 CFR 40.33, as designated by the marine employer submitting the specimen for testing. Wherever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR 40.33 and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly

reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

§ 4.06-60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) When the serious marine incident requires the submission of Form CG-2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with § 4.05-10, the report required by paragraph (a) of this section shall be appended to Form CG-2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03-2 (b) and (c) of this part, when Form CG-2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to

the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted.

[CGD 86-067, 53 FR 47078, Nov. 21, 1988, as amended by CGD 97-057, 62 FR 51041, Sept. 30, 1997]

6. Section 16.230 of Title 46 of the Code of Federal Regulations provides:

§ 16.230 Random testing requirements.

(a) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on inspected vessels who:

(1) Occupy a position, or perform the duties and functions of a position, required by the vessel's Certificate of Inspection;

(2) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(3) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(b) Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on uninspected vessels who:

(1) Are required by law or regulation to hold a license issued by the Coast Guard in order to perform their duties on the vessel;

(2) Perform duties and functions directly related to the safe operation of the vessel;

(3) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,

(4) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.

(c) The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection.

(d) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(e) Except as provided in paragraph (f) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered crewmembers.

(f) The annual rate for random drug testing may be adjusted in accordance with this paragraph.

(1) The Commandant's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported random positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Commandant considers the quality and completeness of the reported data, may obtain additional information or reports from marine employers, and may make appropriate modifications in calculating the industry random positive rate. Each year, the Commandant will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered crewmembers. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(2) When the minimum annual percentage rate for random drug testing is 50 percent, the Commandant may lower this rate to 25 percent of all covered crewmembers if the Commandant determines that the data received under the reporting requirements of 46 CFR 16.500 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(3) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of 46 CFR 16.500 for any calendar year indicate that the positive rate is equal to or greater than 1.0 percent, the Commandant will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered crewmembers.

(g) Marine employers shall randomly select a sufficient number of covered crewmembers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Commandant. If the marine employer conducts random drug testing through a consortium, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of covered crewmembers covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(h) Each marine employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(i) If a given covered crewmember is subject to random drug testing under the drug testing rules of more than one DOT agency for the same marine employer, the crewmember shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the crewmember's function.

(j) If a marine employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the marine employer may—

(1) Establish separate pools for random selection, with each pool containing the covered crewmembers who are subject to testing at the same required rate; or

(2) Randomly select such crewmembers for testing at the highest percentage rate established for the calendar year by any DOT agency to which the marine employer is subject.

(k) An individual may not be engaged or employed, including self-employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crewmembers covered by this section are subject to the random testing requirements of this section.

7. Section 16.240 of Title 46 of the Code of Federal Regulations provides:

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

APPENDIX H

1. Section 317-21-200(a) of the Washington Administrative Code provides:

317-21-200. Operating procedures—Watch practices.

* * * * *

(a) When the tanker is operating in restricted visibility, the navigation watch shall include at least three licensed deck officers, one of whom may be a state-licensed pilot when the tanker is in pilotage waters. The vessel master or officer in charge shall determine periods of restricted visibility and record in the deck log the time restricted visibility begins and ends.

* * * * *

2. Section 317-21-230 of the Washington Administrative Code provides:

317-21-230. Personnel policies—Training.

An oil spill prevention plan for a tanker must describe a comprehensive training program that requires training beyond the training necessary to obtain a license or merchant marine document. The program must include instruction on the use of job-specific equipment, installed technology, lifesaving equipment and procedures, and oil spill prevention and response equipment and procedures. The program must at a minimum contain the following elements.

(1) Crew training. Within three years from the effective date of this chapter or from the date of employment by the owner or operator, whichever is

later, a crew member shall complete a comprehensive training program approved by the office.

(2) Vessel orientation. Personnel newly assigned to a tanker or who have not served on another tanker of the same vessel type for more than one year, and maintenance personnel who sail on tankers, shall undergo an orientation that includes:

(a) Station assignments and procedures under WAC 317-21-220; and

(b) A vessel familiarization tour that includes:

(i) A walking tour of the deck house and other spaces designated by the vessel master; and

(ii) Identification of all egress routes.

(3) Position specific requirements. All personnel newly hired or who have not served on a tanker of the same vessel type for more than one year, and who are filling positions designated on the vessel's certificate of inspection issued by the U.S. Coast Guard or safe manning certificate issued by the vessel's nation of registry, shall complete training specific to their position.

(a) The vessel's master, chief mate, chief engineer, and senior assistant engineer shall be trained in shipboard management.

(b) The vessel's master and other licensed deck officers shall be trained in:

(i) Bridge resource management;

(ii) Automated radar plotting aids;

(iii) Shiphandling;

(iv) Crude oil washing, if the vessel is so equipped;

(v) Inert gas systems, if the vessel is so equipped;

(vi) Cargo handling for all cargo types carried, including associated hazards with each type, and hull stress during cargo transfer;

(vii) Oil spill prevention and response responsibilities; and

(viii) Shipboard fire fighting.

(c) The vessel's licensed engineering officers shall be trained in:

(i) Inert gas systems, if the vessel is so equipped;

(ii) Vapor recovery systems, if the vessel is so equipped;

(iii) Crude oil washing, if the vessel is so equipped;

(iv) Oil spill prevention and response responsibilities; and

(v) Shipboard fire fighting.

(d) Unlicensed ratings shall be trained in bridge resource management if assigned bridge responsibilities, or in cargo handling if assigned cargo handling responsibilities, or both, and all ratings shall receive training in oil spill prevention and response, and shipboard fire fighting.

(4) Refresher training. Personnel who received training described in subsection (3) of this section shall

undergo refresher training at least once every five years. Refresher training must include examination of the crew member's skills to determine his or her ability to safely and effectively perform in the position assigned. Personnel who fail to undergo refresher training within five years, shall complete the position specific training program required in subsection (3) of this section.

(5) Shipboard drills. The following shipboard drills must be conducted and logged in the vessel's deck log.

(a) A weekly fire drill that meets the requirements of 46 C.F.R. sec. 35.10-5.

(b) A monthly abandon ship drill that meets the requirements of the International Convention on Safety of Life at Sea, Chapter III, Part B, Regulation 18.

(c) The following drills must be conducted quarterly:

(i) Oil spill response;

(ii) Emergency steering that complies with the International Convention of Safety of Life at Sea, Chapter V, Regulation 19-2(d);

(iii) Loss of propulsion;

(iv) Loss of electrical power;

(v) Emergency towing; and

(vi) Man overboard.

3. Section 317-21-235(6) of the Washington Administrative Code provides:

317-21-235. Personnel policies—Illicit drug and alcohol use.

* * * * *

(6) The owner or operator shall report to the office the name, rating and assigned vessel of any navigation or engineering watchstander who remains employed by the owner or operator as a watchstander after testing positive more than once during the previous twelve months of employment for illicit drugs or use of alcohol on a tanker. The report shall be made within seventy-two hours of confirmation of the positive test result.

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4. Section 317-21-250(1) of the Washington Administrative Code provides:

317-21-250. Personnel policies—Language.

An oil spill prevention plan for a tanker must demonstrate that:

(1) All licensed deck officers and the vessel's designated person in charge under 33 CFR sec. 155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew;

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